DOCKET

No. 07-77
Title: Bob Riley, Governor of Alabama, Appellant
v.
Yvonne Kennedy, et al.
Docketed: July 23, 2007
Lower Ct: United States District Court for the Middle District of Alabama
Case Nos.: (2:05cv1100-MHT)
Decision Date: May 1, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 17 2007	Statement as to jurisdiction filed. (Response due August 22, 2007)
Aug 10 2007	Order extending time to file response to jurisdictional statement to including October 22, 2007.
Oct 22 2007	Motion to dismiss or affirm filed by appellees Yvonne Kennedy, et al.
Nov 5 2007	DISTRIBUTED for Conference of November 20, 2007.
Nov 6 2007	Reply of appellant Bob Riley, Governor of Alabama, Appellant filed. (Distributed)
Nov 20 2007	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
Dec 11 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 14, 2008.
Jan 3 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the appellant.
Jan 11 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the appellees.
Jan 14 2008	Joint appendix filed. (Statement of costs filed)
Jan 14 2008	Brief of appellant Bob Riley, Governor of Alabama, Appellant filed.
Jan 22 2008	SET FOR ARGUMENT ON Monday, March 24, 2008
Jan 22 2008	Brief amici curiae of Abigail Thernstrom and Stephan Thernstrom filed.
Jan 22 2008	Brief amici curiae of Former State Court Justices Charles Fried and Thomas R. Phillips filed.
Jan 22 2008	Brief amicus curiae of Project on Fair Representation filed.
Jan 22 2008	Brief amici curiae of Florida, et al. filed.
Feb 5 2008	CIRCULATED.
Feb 5 2008	Record received from the U.S.D.C. for the Middle District of Alabama. (1 box)
Feb 13 2008	Brief of appellees Yvonne Kennedy, et al. filed. (Distributed)
Feb 19 2008	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 20 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 20 2008	Motion of Florida, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Feb 20 2008	Brief amicus curiae of United States supporting appellees in part filed. (Distributed)
Feb 20 2008	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. (Distributed)

Feb 20 2008	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc filed. (Distributed)
Mar 3 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 3 2008	Motion of Florida, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Mar 11 2008	Reply of appellant Bob Riley, Governor of Alabama, Appellant filed. (Distributed)
Mar 24 2008	Argued. For appellant: Kevin C. Newsom, Birmingham, Ala. For appellees: Pamela S. Karalan, Stanford, Cal.; and Kannon K. Shanmugam, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

JURISDICTIONAL STATEMENT

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Supreme Court, U.S.
FILED

07-77 JUL 17 2007

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No. __-____

In the
Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

JURISDICTIONAL STATEMENT

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July 17, 2007

QUESTIONS PRESENTED

This Section 5 litigation involves two decisions of the Supreme Court of Alabama, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). Those decisions concern the manner of filling vacancies on the Mobile County Commission and are based on valid, race-neutral, generally-applicable principles of law. The three-judge district court held that both decisions required preclearance to be enforceable. The State submitted the decisions for preclearance, and the Attorney General of the United States interposed an objection. The district court then entered a remedy order vacating a gubernatorial appointment that had relied on these State court decisions to fill a vacancy that had arisen. This appeal presents the following questions:

1. Whether the decision of a covered jurisdiction's highest court that a precleared State law is unconstitutional and, thereby, invalid as a matter of State law is a change that affects voting that must be precleared before it can be enforced.

2. Whether the preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal establishes a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced.

PARTIES TO THE PROCEEDINGS

A. Parties To This Proceeding.

BOB RILEY, in his official capacity as Governor of the State of Alabama, is the appellant in this case and was the defendant below.

YVONNE KENNEDY, JAMES BUSKEY, and WILLIAM CLARK are the appellees in this case and were the plaintiffs below.

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JURISDICTIONAL STATEMENT

Bob Riley, in his official capacity as Governor of the State of Alabama, appeals from the Order of the three-judge federal district court vacating the appointment of Mr. Juan Chastang, an African-American, to fill a vacancy on the Mobile County Commission, as well as from the rulings that form the predicate for that Order.

OPINIONS BELOW

The district court's Order vacating Governor Riley's appointment of Mr. Juan Chastang to fill a vacancy on the Mobile County Commission has not been published, but appears as *Kennedy v. Riley*, ___ F. Supp. 2d ___, 2007 WL 1284912 (M.D. Ala. May 1, 2007) (three-judge court). The Order is reprinted in the Appendix at 1a. That Order followed an earlier Opinion and Judgment that the two decisions which led to the appointment, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), required preclearance before they could be enforced. That decision of the three-judge court is published at *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006). The three-judge court's Opinion is reprinted at Appendix 3a, and the Judgment is reprinted at 9a.

JURISDICTION

This case arises under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Jurisdiction in the three-judge district court and in this Court is proper pursuant to 42 U.S.C. § 1973c, which states, in pertinent part, "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

In this litigation, the three-judge court acted exclusively as a *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), court. Hence, the court considered the following inquiries to be relevant: "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *Id.*

The second inquiry, whether preclearance of the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* had been obtained, was not an issue in this case; all agreed it had not been. As to the first inquiry, on August 18, 2006, the three-judge court determined that preclearance was required before those decisions could be implemented and allowed the State time to seek preclearance. On May 1, 2007, after the State's efforts at administrative preclearance were frustrated, the three-judge court completed its *City of Lockhart* function and entered a remedy order, vacating Governor Riley's appointment of Mr. Juan Chastang.

On May 18, 2007, Governor Riley filed notice of appeal from the district court's May 1, 2007 Order, as well as from the rulings that form the predicate for that Order, specifically the August 18, 2006 Opinion and Judgment. See 11a. The notice of appeal was timely filed after the May 1, 2007 Order, which represents the conclusion of the core proceedings in the case. After Governor Riley appealed, the Kennedy Appellees requested additional relief, and that request was denied without prejudice.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the application of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. While the application of Section 5 in this case raises constitutional questions, those concerns were not considered by the three-judge court. Rather, that court applied the test set out in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), and did not address the

constitutional and workability concerns raised by Governor Riley.

STATEMENT OF THE CASE

A. Legal Proceedings.

This Section 5 litigation involves two decisions of the Supreme Court of Alabama, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), and their effect on the method of filling vacancies on the Mobile County Commission. These decisions are reprinted in the Appendix at 17a and 25a, respectively.

From the mid to late 1800s until 2004, Alabama's general law provided that vacancies on the county commissions of the 67 counties were to be filled by gubernatorial appointment. A handful of counties had contrary local laws. A 1985 local law applicable to Mobile County provided for the filling of vacancies on the Mobile County Commission by special election. The 1985 local law was precleared.

When a vacancy arose on the Mobile County Commission and it was the first time for the local law to be put in action for the first time, litigation ensued. Applying valid, race-neutral, generally applicable principles of law, the Supreme Court of Alabama determined that the 1985 local law violated a provision of the Constitution of Alabama (1901) that forbids, with one exception not applicable here, local laws that conflict with general laws. *Stokes v. Noonan*.

In 2004, the Alabama Legislature amended the general law to allow for local laws concerning the filling of vacancies on county commissions. The 2004 Act was precleared.

In 2005, a vacancy arose on the Mobile County Commission. Yvonne Kennedy, James Buskey, and William Clark, all African-Americans and then members of the Alabama House of Representatives (the "Kennedy Appellees," unless otherwise stated), filed suit in the Circuit

Court of Montgomery County, a trial court of general jurisdiction in Alabama. They sought a declaration that the vacancy was to be filled by special election (pursuant to the 1985 local law) and injunctive relief directing that such a special election be conducted. The Circuit Court entered judgment in favor of the plaintiffs, holding that the vacancy was to be filled by special election. Governor Riley appealed.

On November 9, 2005, following an expedited appeal, the Supreme Court of Alabama reversed the judgment of the Circuit Court. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). Alabama's highest court held that the change to the general law on which the Circuit Court had relied—the 2004 Act—operated prospectively only and did not revive the unconstitutional 1985 local law. Accordingly, there was no State law basis for a special election, and the vacancy was to be filled by gubernatorial appointment.

On November 16, 2005, the Kennedy Appellees filed suit in the United States District Court for the Middle District of Alabama alleging that the Alabama Supreme Court's decision in *Riley v. Kennedy* was a change to a voting standard, practice, or procedure that had to be precleared before it could be enforced. As the case proceeded, the Kennedy Appellees also alleged that the 1988 decision of the Supreme Court of Alabama in *Stokes v. Noonan* was a change that had to be precleared before it could be enforced.

Governor Riley contended that neither decision represented a change because both affected the underlying validity of the State's laws, which is an entirely distinct consideration from their enforceability under Section 5. Preclearance is an action by federal authorities that makes a valid State statute enforceable. Without a valid State law, though, a preclearance letter is of no effect.

Acting as a *City of Lockhart* court, the three-judge federal court held that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* were changes that could not be enforced unless

precleared. The court refrained from moving immediately to the relief stage and allowed the State 90 days to seek preclearance.

By letter dated November 9, 2006, the Attorney General of Alabama submitted the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* to the Attorney General of the United States for review pursuant to Section 5. By letter dated January 8, 2007, the Attorney General of the United States, through Wan J. Kim, Assistant Attorney General for Civil Rights, objected to the State's enforcement of those decisions, notwithstanding that they were based on valid, race-neutral, generally-applicable principles of law. By letter dated January 30, 2007, the State asked the Attorney General of the United States to reconsider his decision. By letter dated March 12, 2007, Assistant Attorney General Kim "decline[d] to withdraw the January 8 objection."

In an Order of May 1, 2007, the district court vacated Governor Riley's appointment of Mr. Chastang to fill the vacancy. See 1a. The court denied Governor Riley's motion for a stay pending appeal. On May 18, 2007, Governor Riley appealed from that May 1, 2007 Order and from the prior orders on which that relief order was based. See 11a.

The day before Governor Riley filed his notice of appeal, the Judge of Probate for Mobile County, the county's chief election official, moved to intervene in the federal litigation to seek guidance as to how to proceed. One of the complicating factors, in his view, was that a 2006 local law had not been precleared. That 2006 local law essentially re-enacted the 1985 local law; because the 2006 local law would operate prospectively and because the Alabama Legislature changed the general law in 2004 to allow for local laws like it, the 2006 local law was not unconstitutional for the reason set out in *Stokes v. Noonan*.

When the Kennedy Appellees sued the probate judge in State court, he filed a withdrawal of his motion to intervene. The three-judge federal court treated the notice of withdrawal

as a motion to withdraw and granted it. Thereafter, representing that they had dismissed their State court action, the Kennedy Appellees sought to join the probate judge as a party in the federal court litigation and to have the federal court schedule a special election to fill the vacancy.

A hearing was held and the federal court strongly suggested that the Kennedy Appellees should re-file their action in State court and that the 2006 local law should be submitted for preclearance. The Kennedy Appellees re-filed that day in the Mobile County Circuit Court, and, within a matter of days, the State court entered an order setting an election schedule. The court's order, including an election schedule which does not comply with the 1985 local law or with the 2006 local law, was submitted for Section 5 review and immediately precleared. The State submitted the 2006 local law for Section 5 review, and preclearance was granted the next week. Accordingly, the process for conducting a special election is underway in Mobile County.

In addition to pursuing this appeal, the State of Alabama will file suit seeking, among other things, judicial preclearance.

B. Statement of Facts.

Before November 1, 1964, the effective date of the Voting Rights Act in Alabama, general law provided that vacancies on the 67 county commissions of Alabama, including the Mobile County Commission, would be filled by gubernatorial appointment. That general law was codified at § 11-3-6, Code of Alabama (1989).

In 1985, the Legislature passed a local law, Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by special election, under certain conditions not relevant here. That special election was to be held no sooner than 60 days after the vacancy arose and before 90 days had passed. The State of Alabama

submitted Act No. 85-237 for preclearance in accordance with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and, by letter dated June 17, 1985, the State was advised that the Attorney General of the United States had no objection to the proposed change.

In 1987, a vacancy on the Mobile County Commission occurred. In April of that year, Willie Stokes filed suit in the Circuit Court of Mobile County, attacking the constitutionality of Act No. 85-237. Stokes contended that Act No. 85-237 violated §§ 104(29) and 105 of the Constitution of Alabama (1901), in that, respectively, it was a local law on a prohibited subject and on a subject controlled by a general law.[1] The effect of declaring Act No. 85-237 unconstitutional would be to revert to the pre-1964 general law of gubernatorial appointment.

The Circuit Court denied relief, and, even though Stokes appealed, the vacancy was filled by special election. On appeal, in a decision issued on September 30, 1988, the Supreme Court of Alabama reversed the judgment of the Circuit Court. In *Stokes v. Noonan*, the Supreme Court of Alabama declared Act No. 85-237 unconstitutional because it violated § 105 of the Constitution of Alabama, in that the general law codified at § 11-3-6 of the Alabama Code was primary, Act No. 85-237 was a local law on the same subject, and Act No. 85-237 could not be enacted consistently with § 105.[2]

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[1] Article IV, § 104(29), Constitution of Alabama (1901), provides, in pertinent part, "The legislature shall not pass a special, private, or local law . . . [p]roviding for the conduct of elections . . . ." *Id.*

Article IV § 105 of the Constitution of Alabama (1901), provides, in part, "No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law . . . ." *Id.*

[2] The Supreme Court of Alabama did not address Stokes's contention that Act No. 85-237 violated § 104(29) of the Constitution of Alabama.

The decision of the Supreme Court of Alabama created a vexing issue of State law. Without any State law authority to conduct a special election, Mr. Sam Jones, who had been elected, had no right to hold the office and was vulnerable to an action in *quo warranto*. Then-Governor Guy Hunt, a Republican elected on a statewide basis, solved the problem by appointing Mr. Sam Jones, who is African-American, to fill the vacancy.

In 2004, the Alabama Legislature amended the general law, § 11-3-6, by passing Act No. 2004-455. As amended, § 11-3-6 provided that vacancies on county commissions would be filled by gubernatorial appointment "[u]nless local law authorizes a special election." Ala. Code § 11-3-6 (Supp. 2004).

Act No. 2004-455 was submitted for preclearance. By letter dated September 28, 2004, the State was advised that the Attorney General of the United States had no objection to the proposed change.

The next time that a vacancy on the Mobile County Commission occurred was in September 2005, when Mr. Sam Jones, then the incumbent Commissioner for District 1, was elected Mayor of Mobile. With the vacancy, the method of filling it became a bone of contention. Some contended that the vacancy had to be filled by special election, pointing to Act No. 85-237 and arguing that it had been revived by Act No. 2004-455. Others contended that, with the declaration that Act No. 85-237 was unconstitutional in *Stokes v. Noonan*, the vacancy had to be filled by gubernatorial appointment pursuant to the general law.

Yvonne Kennedy, James Buskey, and William Clark, all African-Americans and then members of the Alabama House of Representatives, filed suit in the Circuit Court of

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That issue, whether a local law providing for the filling of vacancies on county commissions by special election complies with § 104(29), remains unresolved.

Montgomery County seeking declaratory and injunctive relief. They sought a declaration that the vacancy was to be filled by a special election and an injunction directing the local probate judge to conduct one.[3] Governor Riley, who was named as a defendant, responded by contending that, with the declaration that Act No. 85-237 was unconstitutional in *Stokes v. Noonan*, he was empowered to fill the vacancy by appointment. The Circuit Court of Montgomery County ruled in favor of the plaintiffs, and Governor Riley appealed.

After the Circuit Court ruled, and notwithstanding the fact that the ruling was on appeal, the local probate judge asked the Attorney General of the United States to preclear a special election calendar. The probate judge needed to get the machinery started if an election was going to occur within 60 to 90 days, and he had to prepare for the possibility of a primary election, a primary runoff, and a general election. The preclearance submission included a copy of the Circuit Court's Order and necessarily relied on that Order to provide a State law basis for holding the special election.

By letter dated October 25, 2005, the Attorney General of Alabama suggested that the Attorney General of the United States withhold action on the probate judge's submission pending the outcome of the litigation in State court. The Attorney General of Alabama pointed out that the proceedings on appeal had been expedited and that withholding action was consistent with 28 C.F.R. § 51.22 (2004). That regulatory provision states:

> [W]ith respect to a change for which approval by . . . a State . . . court . . . is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final

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[3] Under Alabama law, the probate judge is the chief election official for each county.

> approving action and if all other action necessary for approval has taken place.

Id.

Even though the office of the Attorney General of the United States knew that the Circuit Court's decision was not final and the proceedings on appeal were expedited, the Voting Section declined to withhold action and interposed no objection to the proposed special election calendar.

As the Attorney General of Alabama suggested might happen, the Supreme Court of Alabama reversed the judgment of the Circuit Court. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). The court held that Act No. 2004-455 did not act retroactively so as to revive Act No. 85-237. Rather, the change to the general law operated prospectively to open the door to future local laws. Without Act No. 85-237, there was no basis in State law for a special election.[4] In reaching this result, the Supreme Court of Alabama applied valid, race-neutral, generally-applicable principles of law.

After the Supreme Court of Alabama issued its decision in *Riley v. Kennedy*, Governor Riley appointed Mr. Juan Chastang, who is African-American, to fill the vacancy on the Mobile County Commission. Under State law, Mr. Chastang would serve the remainder of Sam Jones' term and stand for election in 2008.

District 1 of the Mobile County Commission is a majority-black district. The other two districts on the Mobile County Commission are, however, majority-white, and so is Mobile County as a whole. As a result, Act No. 85-237, which covers the entirety of Mobile County, applies to more white voters than it does to black voters.

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[4] The Attorney General of Alabama wrote to the Chief of the Voting Section to inform him of the Supreme Court of Alabama's decision in *Riley v. Kennedy*, and to let him know that the previously precleared special election would not be taking place.

One week after the Supreme Court of Alabama issued its decision in *Riley v. Kennedy*, the Kennedy Appellees filed suit in the United States District Court for the Middle District of Alabama alleging that the Alabama Supreme Court's decision in *Riley v. Kennedy* was a change to a voting standard, practice, or procedure that had to be precleared before it could be enforced. As the case proceeded, the Kennedy Appellees also alleged that the 1988 decision of the Supreme Court of Alabama in *Stokes v. Noonan* was a change that had to be precleared before it could be enforced.

Acting as a *City of Lockhart* court, the three-judge federal court held that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* were changes that could not be enforced unless precleared. The court refrained from moving immediately to the relief stage and allowed the State 90 days to seek preclearance. When administrative preclearance was denied, the three-judge federal court vacated Governor Riley's appointment of Juan Chastang. The process for conducting a special election is now underway in Mobile County.

ARGUMENT

By its terms, Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, precludes a covered jurisdiction from enforcing a change to a standard, practice, or procedure that affects voting unless the Attorney General of the United States declines to object to the change or a three-judge federal district court sitting in the United States District Court for the District of Columbia declares that the change has neither the purpose nor the effect of discriminating on the basis of race. Inherent in the process is the presumption that the change made by the covered jurisdiction is valid as a matter of State law. This case presents the question whether two decisions of the Supreme Court of Alabama that deprived State statutes of operative effect represent changes that must be precleared.

This case also presents an important question concerning the intersection of Federal and State law that highlights the constitutional tensions inherent in the preclearance scheme of Section 5. Before a State statute that affects voting can be enforced, it must be both valid as a matter of State law and precleared. If that is not the case, the covered jurisdiction will be told to do something for which there is no basis in State law. As a result of the interpretation of Section 5 by the three-judge district court in this case, the State has been compelled to conduct a special election pursuant to a State statute that is unconstitutional.[5]

I. A decision by a covered jurisdiction's highest court that a precleared State law is unconstitutional and, thereby, invalid as a matter of State law is not a change that requires preclearance before it can be enforced.

In concluding that *Stokes v. Noonan* required preclearance, the three judge court essentially held that the validity of a State law is irrelevant. That conclusion, which is offensive to federalism and the State's sovereignty interest, is inconsistent with this Court's decision in *Abrams v.*

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[5] When this case was filed, the only conceivable basis for conducting a special election was pursuant to Act No. 85-237, which had been declared unconstitutional in *Stokes v. Noonan.* While this litigation was pending, Representatives Yvonne Kennedy, James Buskey, William Clark and Joseph Mitchell sponsored the legislation that became Act No. 2006-342. Act No. 2006-342 readopts Act No. 85-237, providing that vacancies on the Mobile County Commission are to be filled by special election to be held between 60 and 90 days after the vacancy occurs. While the Mobile County Circuit Court has entered an order setting out an election schedule that does not comply with either Act and that, further, required preclearance of the 2006 Act, that 2006 Act did not yet exist when the vacancy arose or when Kennedy, Buskey, and Clark initiated this litigation. The probate judge for Mobile County, who was the defendant in the Mobile County Circuit Court litigation, prefers to travel under the 2006 Act, and the Governor certainly understands why State officials would be uncomfortable conducting their official duties pursuant to a local law that the Supreme Court of Alabama has declared unconstitutional.

Johnson, 521 U.S. 74 (1997). *Abrams* demonstrates that both validity and enforceability are required.

In the post-1990 redistricting cycle, the Georgia Legislature passed two redistricting plans that were not precleared and a third that was held to be the product of an unconstitutional racial gerrymander in *Miller v. Johnson*, 515 U.S. 900 (1995). Ultimately, the federal courts drew a plan, and this Court considered a variety of challenges to that remedial plan, including a Section 5 challenge, in *Abrams*. With respect to that Section 5 challenge, this Court pointed out that a plan that was not precleared could not serve as a benchmark. 521 U.S. at 96. Neither could the plan that was declared unconstitutional. As this Court explained, that plan, "constitutional defects and all," could not be the benchmark because "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." 521 U.S. at 97. Indeed, the unconstitutional plan could not be used as the benchmark even though elections had been conducted under it.

The Alabama Supreme Court's declaration in *Stokes v. Noonan*, that Act No. 85-237 is unconstitutional operates just like this Court's decision in *Miller v. Johnson* did on the Georgia redistricting plan at issue. Under Alabama law, acts that have been declared unconstitutional are void *ab initio*. *Ex parte Southern Railway*, 556 So. 2d 1082, 1089-90 (Ala. 1989). Allowing the preclearance of Act No 85-237 to freeze it in place forces the State to follow an unconstitutional law. And, the fact that an election was conducted under it should have no more effect than the legislative elections in Georgia conducted under the unconstitutional plan.

This Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997), is also instructive in analyzing whether *Stokes v. Noonan* effected a change requiring preclearance. *Young* arose from the State of Mississippi's attempt to conform its voter registration system to the National Voter Registration Act of 1993. State officials devised a Provisional Plan and

began to implement it, anticipating that the Mississippi Legislature would adopt it. The Provisional Plan was also submitted for preclearance and precleared before the Legislature decided not to adopt the Provisional Plan and came up with a New Plan, which was not precleared.

This Court held that, while the New Plan had to be precleared before it could be implemented because it differed from the pre-NVRA system, the intervening Provisional Plan was not the baseline even though it had been precleared. This Court concluded that the Provisional Plan was never in "force or effect" as Section 5 requires. While "[a] State might, after all, maintain in effect for many years a plan that technically, or in one respect or another, violate[s] state law," 520 U.S. at 283, the Provisional Plan was not such a plan. Instead, it was used for only a short period of time with the anticipation that the Legislature would adopt it, and its use was abandoned "as soon as its unlawfulness became apparent." *Id.* at 283.

In the same way, the special election scheme in Act No. 85-237 was short-lived and was abandoned after its unlawfulness became apparent. While a special election had been held, that election was the result of the vagaries of the litigation process; if the Circuit Court had enjoined the election as Plaintiff Stokes wanted, and as the Alabama Supreme Court's decision held it should have, there would have been no election to which to point. In any event, Act 85-237 was abandoned as soon as its unlawfulness became apparent and then-Governor Hunt exercised his power of appointment under the general law. Governor Hunt, a Republican elected on a statewide basis, appointed Mr. Sam Jones, the candidate who had won the special election, to fill the vacancy. In doing so, he resolved a vexing issue of State law, as Mr. Jones was subject to a *quo warranto* action seeking to oust him from office after the decision in *Stokes v. Noonan*. Hence, just as in *Fordice*, Act 85-237 was never truly "in force or effect."

II. Preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal does not establish a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced.

With respect to *Riley v. Kennedy*, the three-judge federal court's conclusion that there has been a change is even more intrusive. The special election schedule that was precleared by the Attorney General of the United States relied upon a Circuit Court ruling that was not final. Moreover, when he acted, the Attorney General of the United States knew not only this, but also that the proceedings in the Supreme Court of Alabama were expedited. At best, preclearance allowed the election machinery to get started on a provisional basis. Preclearance should not, however, have the effect of preserving in amber a State action that was not final and immunizing it from reversal before finality. Otherwise, an unelected federal bureaucrat will not only determine State law but also preempt the State's legal or administrative processes.

This Court's decision in *Perkins v Matthews*, 400 U.S. 379 (1971), is not to the contrary. In *Perkins*, the City of Canton, Mississippi, did not follow a 1962 State law in its 1965 municipal elections. When it sought to follow the 1962 law in 1969, this Court held that the change was one that required preclearance even though it had the effect of bringing Canton into compliance with State law. No court order, federal or State, mandated or prohibited Canton's compliance with the 1962 law in 1965. Rather, Canton had deviated from State law on its own.

In this case, it is the final rulings of the State's highest court that deprive local Act No. 85-237 of effect. While Act No. 85-237 was not challenged until 1987 after having been precleared in 1985, the challenge came when the first

vacancy arose.[6] *Stokes v. Noonan* represents the first and final word of the Alabama judicial system on the use of Act No. 85-237. Likewise, when the Supreme Court of Alabama held that the change to the general law in 2004 operated prospectively, that was the first time anyone had tried to use it to revive Act No. 85-237.

Perkins is distinguishable for another reason as well. *Perkins* concerned the practice in effect on Mississippi's coverage date. That is, Section 5 states that a covered jurisdiction must receive preclearance before it can change a standard, practice or procedure that was in effect on the applicable coverage date, which is November 1, 1964 for Mississippi and for Alabama. 42 U.S.C. § 1973c(a) ("Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . ."). In *Perkins*, the City of Canton had not followed State law on the coverage date, and allowing the City to make a change to follow State law without preclearance would have required peeking behind the coverage date.

Here, on Alabama's coverage date, vacancies in the Mobile County Commission were filled by gubernatorial appointment. The decision in *Stokes v. Noonan* that Act No. 85-237 was unconstitutional returned the State to its practice on its coverage date; it did not make a change from the practice in force or effect on the coverage date. In Mobile County, the decision in *Riley v. Kennedy* continued the status quo established by *Stokes v. Noonan*.

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[6] A challenge to the constitutionality of Act No. 85-237 would not have been ripe before it came time to use the Act to call a special election to fill a vacancy.

III. The district court's conclusion that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* require preclearance raises grave constitutional and workability concerns.

As noted above, the three-judge federal district court applied the test in *City of Lockhart*, and did not address the constitutional and workability problems its ruling creates. With its refusal to preclear *Stokes v. Noonan* and *Riley v. Kennedy*, United States Department of Justice has made State law and effectively commandeered State officials in violation of the Tenth Amendment. As this Court has held, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981); see also *Coyle v. Smith*, 221 U.S. 559 (1911) (Congress lacks power to condition statehood on specific location of state capital). If Congress cannot tell a State what its law is, neither can the United States Department of Justice.

As to workability, in the ordinary course of the State's business, it reviews and submits legislation affecting voting for preclearance as soon as it can after the Legislature concludes its session. That submission and preclearance 60 days later can be complete well before litigation challenging the constitutionality of the statute in question can be concluded, or even initiated. That is exactly what happened with Act No. 85-237, which was precleared before it was ripe to challenge its constitutionality.[7] The same scenario played out again as this litigation progressed with respect to an Act of the 2006 Legislature which was precleared and then attacked on constitutional grounds in State court.

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[7] While this litigation was ongoing, another local Act of the Legislature that affected an additional judgeship in one of Alabama's 67 counties and had been precleared was attacked on constitutional grounds in State court. That litigation is on-going.

Finally, the State notes that it has done nothing wrong. When the Supreme Court of Alabama declared local Act No. 85-237 unconstitutional in 1988, then-Governor Guy Hunt, a white Republican, appointed Mr. Sam Jones, the African-American who had won the special election, to fill the vacancy. When the Supreme Court of Alabama held that general Act No. 2004-455 did not revive local Act No. 85-237, Governor Riley appointed Mr. Juan Chastang, an African-American, to fill the vacancy. Mr. Chastang may not be the choice of the Kennedy Appellees, but he would have had to run for a full term in 2008. Moreover, the Alabama Legislature used general Act No. 2004-455 prospectively to pass a new local law providing for the filling of vacancies on the Mobile County Commission by special election, namely Act No. 2006-342. Thus, change has come about through the ordinary political process.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's Order vacating the appointment of Mr. Juan Chastang and remand the case with instructions to declare that neither *Stokes v. Noonan* nor *Riley v. Kennedy* represents a change affecting voting that must be precleared to be enforceable.

Respectfully submitted,

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July 17, 2007

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	2:05cv1100-MHT
	)	(WO)
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

ORDER

On August 18, 2006, this three-judge court held that two Alabama Supreme Court decisions, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005), must be precleared before they can be implemented. *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1337 (M.D. Ala. 2006). On January 8, 2007, after the State of Alabama had submitted the state-court decisions for preclearance, the United States Department of Justice refused to preclear them, and, on March 12, 2007, refused to reconsider its decision. This matter is now before us on the plaintiffs' renewed motion for further relief.

We conclude that, because *Stokes v. Noonan* and *Riley v. Kennedy* were not precleared, Governor Bob Riley's appointment of Juan Chastang to the Mobile County

Commission pursuant to these two decisions was unlawful under federal law. Chastang's appointment must therefore be vacated.

Accordingly, it is the ORDER, JUDGMENT and DECREE of the court that the plaintiffs' renewed motion for further relief (Doc. No. 44) is granted to the extent that the appointment of Juan Chastang to the Mobile County Commission is vacated.

Done, this the 1st day of May, 2007.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 2:05cv1100-MHT (WO)
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

OPINION

Myron H. Thompson, District Judge:

This three-judge court has been convened to consider the claim of plaintiffs Yvonne Kennedy , James Buskey , and William Clark that, under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c , the State of Alabama was required, but failed, to preclear two decisions of the Alabama Supreme Court: *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005). For the reasons that follow, we hold that the state court decisions should have been precleared before they were implemented.

I.

A brief chronology of the events leading up to the challenge to these two state court decisions is helpful:

April through June 1985: Act No. 85-237, a local law providing, in certain circumstances, for a special election to fill vacancies on the Mobile County Commission, was enacted and, shortly thereafter, precleared by the United States Attorney General.[1] Prior to Act No. 85-237, such vacancies were filled by gubernatorial appointment.

June and July 1987: Pursuant to Act No. 85-237, a special election was held to fill a vacancy on the Mobile County Commission. Sam Jones won and assumed office.

September and October 1988: In *Stokes v. Noonan*, the Alabama Supreme Court held that, because Act No. 85-237 was a local statute and because it conflicted with and was subsumed by another state law of general application, it violated the Alabama Constitution. The governor then appointed Jones to the Mobile County Commission seat to which he was previously elected. The State did not submit *Stokes v. Noonan* for preclearance.

May through September 2004: The Alabama Legislature passed Act No. 2004-455 expressly to allow local laws to make exceptions to the general rule of filling vacancies by

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[1] Act No. 85-237 states that:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant...."

Act of Apr. 8, 1985, No. 85-237, 1985 Ala. Acts 137.

gubernatorial appointments.[2] The United States Attorney General precleared Act No. 2004-455.

September and October 2005: Jones was elected Mayor of Mobile and vacated his Mobile County Commission position.

November 2005: In *Riley v. Kennedy*, the Alabama Supreme Court rejected claims that Act No. 2004-455 revived Act No. 85-237 and that, as a result, Act. No. 85-237 now required that the vacancy on the Mobile County Commission be filled by special election rather than by gubernatorial appointment; the court held that Act No. 2004-455 applied only prospectively. Relying on *Riley v. Kennedy*, the governor appointed Juan Chastang to the vacated position on the Mobile County Commission. As with *Stokes v. Noonan*, the State did not submit *Riley v. Kennedy* for preclearance.

The plaintiffs then filed this lawsuit claiming that *Riley v. Kennedy* and the earlier decision in *Stokes v. Noonan* could not be implemented without first being precleared.

II.

The thrust of the plaintiffs' argument is that , because Act No. 85-237 was precleared and enforced, *Stokes v. Noonan* (the decision invalidating it) and *Riley v. Kennedy* (the later decision refusing to revive, and therefore, to enforce it) should not have been implemented without first being precleared.

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[2] Act No. 2004-455 amended the general law, Ala. Code § 11-3-6, to read as follows:

> "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

A.

Section 5 of the Voting Rights Act requires certain States, such as Alabama, to obtain preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia when they "or [their] political subdivision[s] . . . enact or seek to administer any ... standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Generally, a change from an elected to an appointed office requires preclearance, *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-70 (1969), and a § 5 change may be brought about by state court decisions. *Branch v. Smith*, 538 U.S. 254, 262 (2003).

"The State may preclear a voting change in one of two ways: it may obtain a declaratory judgment in the United States District Court for the District of Columbia, or it may submit the change to the Attorney General of the United States for approval. If the Attorney General approves the change, or fails to register an objection to the change within 60 days, the change is precleared." *Boxx v. Bennett*, 50 F. Supp.2d 1219, 1223 (M.D. Ala. 1999) (three- judge court)

In reviewing the plaintiffs' § 5 claim, we are tasked with the limited purpose of determining "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate." *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). Because it is undisputed that *Stokes v. Noonan* and *Riley v. Kennedy* were not precleared, the critical inquiries for this court are whether these decisions brought about a change covered by § 5, and, if so, the appropriate remedy.

In determining whether a change covered by § 5 occurred, we must first determine if there was, in fact, a change. Changes are measured by comparing the new

challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect. *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997) (citing 28 CFR § 51.54); *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990).

Here, the parties dispute what constitutes the baseline practice. The plaintiffs argue that the baseline is Act No. 85-237, which provided for the filling of the vacancy on the Mobile County Commission by special election; they maintain that *Stokes v. Noonan* and *Riley v. Kennedy* were changes because the former invalidated the Act and the latter still refused to enforce it. The State responds that the baseline could not be Act No. 85-237 because the Alabama Supreme Court declared it unconstitutional; the State posits that *Stokes v. Noonan* and *Riley v. Kennedy* did not reflect a change but were rather a mere reaffirmation of the correct scope of the governor's preexisting appointment power under Alabama general law.

We think the plaintiffs have the better argument. Because Act No. 85-237 was the most recent precleared practice put into force and effect with the election of Jones in 1987, it is the baseline against which we must determine if there was a change. To be sure, the Alabama Supreme Court declared Act No. 85-237 unconstitutional under state law; this was, however, after Act No. 85-237 had been put into effect. We are required to determine the baseline "without regard for [its] legality under state law." *Lockhart*, 460 U.S. at 133 (relying on *Perkins v. Matthews*, 400 U.S. 379, 394-395 (1971)).

We therefore hold that, because Act No. 85-237 is the baseline and because *Stokes v. Noonan* invalidated Act No. 85-237 and *Riley v. Kennedy* held that Act No. 85-237 was not rendered enforceable by Act No. 2004-455, the two decisions constituted changes that should have been

precleared before they were implemented. In reaching this holding, we emphasize that we are in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in these two cases, or that the governors acted in accordance with state law in making the appointments. Indeed, this court does not have jurisdiction to address such purely state-law questions. Whether Act No. 85-237 is, in fact, unconstitutional under state law and whether positions on the Mobile County Commission must be filled by special election or gubernatorial appointment are state-law questions we do not reach and should not be understood in any way as reaching; our holding today does not in any way undermine these two decisions under state law. We merely hold that federal law requires that they be precleared before they are implemented.

B.

The plaintiffs suggest that rather than enjoin enforcement of *Stokes v. Noonan* and *Riley v. Kennedy*, or otherwise even consider taking any action regarding the appointment of Juan Chastang to the Mobile County Commission, we should give the State 90 days to obtain the necessary preclearance. We agree.

An appropriate judgment will be entered.

Done this the 18th day of August, 2006.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 2:05cv1100-MHT (WO)
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

Before Stanley Marcus, Circuit Judge, Myron H. Thompson, District Judge, and W. Harold Albritton, Senior District Judge.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that:

(1) Judgment is entered in favor of plaintiffs Yvonne Kennedy, James Buskey, and William Clark and against defendant Bob Riley.

(2) The State of Alabama has 90 days from the date of this order to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c; if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy. Defendant Riley is to keep the court informed of

what action, if any, the State decides to take and the result of that action.

It is further ORDERED that costs are taxed against defendant Riley, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done this the 18th day of August, 2006.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 2:05 CV 1100-T**
HONORABLE BOB RILEY, as Governor of the State of Alabama	)	
Defendant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Bob Riley, in his official capacity as Governor of the State of Alabama, the defendant in this action, hereby appeals to the Supreme Court of the United States from the final Order of the three-judge court vacating his appointment of Juan Chastang to fill a vacancy in the Mobile County Commission, entered in this action on May 1, 2007 (doc. 48), and from prior orders, judgments and decrees of the three-judge court upon which the May 1, 2007 Order necessarily relies, specifically including the Judgment entered on August 18, 2006 (doc. 23) and the Opinion of the same date (doc. 22).

This appeal is taken pursuant to 42 U.S.C. § 1973c, as amended by Pub.L. No. 109-246, § 5, July 27, 2006, 120 Stat. 577, 580, and 28 U.S.C. § 1253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Counsel for the Honorable Bob Riley,
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42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until

the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred

candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Supreme Court of Alabama.

Willie H. STOKES
v.
Lionel W. "Red" NOONAN, in his capacity as Judge of the Probate Court of Mobile County, et al.
86-1082.

Sept. 30, 1988.

BEATTY, Justice.

The plaintiff, Willie H. Stokes, appeals from a judgment in favor of defendant Lionel W. "Red" Noonan, et al., holding that Act No. 85-237, Acts of Alabama 1985, is valid and constitutional.

Stokes, as a registered voter, taxpayer, and real property owner of Mobile County, filed suit in April 1987 contesting the constitutionality of Act No. 85-237, which provides for the filling of vacancies on the Mobile County Commission by a special election when at least 12 months remain on any commissioner's unexpired term:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Stokes contends that the subject of local Act No. 85-237 is

subsumed by a general law, § 11-3-6, Code of 1975, and therefore, under Art. IV, § 105, Constitution 1901, and this Court's decision in *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala.1978), is unconstitutional.

Section 105, in pertinent part, states: "No special, private, or local law ... shall be enacted in any case which is provided by a general law." Section 11-3-6, Code of 1975, is contained in the chapter pertaining to county commissions and refers to vacancies:

> "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

Stokes also contends that Act No. 85-237 violates Art. IV, § 104(29), Constitution of 1901, which states, in pertinent part:"The legislature shall not pass a special, private, or local law in any of the following cases:

> "....
>
> "(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of organization of new counties, or the changing of the lines of old counties...."

We need not address the plaintiff's attacks under § 104(29) because we are convinced that Act No. 85-237 clearly offends § 105 of the Constitution of 1901.

In *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala.1978), this Court explained at length the difference between a local law and a general law, and, applying the literal language of the Constitution of 1901, held that the presence of a general law upon a given subject was *primary,*

meaning "that a local law cannot be passed upon that subject." This Court added at 813:

> "By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute."

Section 11-3-6 is a statewide statute governing the general subject of filling vacancies on county commissions. Its language is substantially the same as its complementary section that appeared in Ala.Code 1940 as Title 12, § 6. See also Ala.Code 1940, Title 12, § 6 (Recomp.1958).

Act No. 85-237 was approved April 8, 1985. By its terms, it is made applicable only to Mobile County. Hence, when it became law it applied to a political subdivision of the state less than the whole, and thus, it was a local law on the same subject as the previously enacted general law, § 11-3-6; see Constitution of 1901, § 110; *Peddycoart,* 354 So.2d at 814; and, accordingly, it is unconstitutional under § 105. We cannot, therefore, agree with the defendant that the Mobile County Commission, because of statutory history, has always been, and therefore is still, governed by local law. To approve such a proposition here would run directly counter to the language of our constitution. Surely, it cannot be held that the legislature is proscribed from enacting general laws on subjects already covered by local laws, even if by application such local laws are repealed, when the intent of the legislature is clear-and it is in this case. See *Buskey v. Mobile County Board of Registrars,* 501 So. 2d 447 (Ala.1986).

In *Baldwin County v. Jenkins*, 494 So. 2d 584 (Ala.1986), a similar question dealing with the constitutionality of a local act was resolved. In that case, this Court was confronted with two statutes dealing with the election and terms of the office of county commissioners. This Court held that the general statute, Code of 1975, § 11-3-1, as amended, having contained the language, "unless otherwise provided by local law," manifested a legislative intent that the subject it dealt with not be subsumed within it:

> "A situation completely opposite and contrary to the one presented here was contemplated and prohibited by the constitutional framers, which is to say that the legislature, by enacting a general law *containing no such provision or exception for contrary local laws,* thereby intended that general law to be *primary* and the subject subsumed entirely by the general law. In that situation, § 105 does operate to prohibit the enactment of contrary local laws. Such is not the case with respect to § 11-3-1 and Act No. 84-639. Because the language of the statute provides for the existence of and prevailing effect of contrary local laws, it must be that the legislature did not intend the subject to be 'subsumed' exclusively within § 11-3-1. That being the case, the co-existence of the general law (§ 11-3-1) and the *contrary* local law (Act No. 84-639) deferred to in the general law, cannot be said to be repugnant to § 105 because 'the constitutional framers have [only] prohibited the enactment of a local act when the subject [as intended by the legislature] is already subsumed by the general statute.' *Peddycoart,* [354 So.2d at 813]."

494 So. 2d at 587. (Emphasis in *Jenkins.*)

No such intent is demonstrated by the language of § 11-3-6 regarding filling of vacancies, and that language must be

given effect according to its terms. Thus, it is our duty to declare Act No. 85-237 unconstitutional as violating § 105. It follows that the judgment appealed from must be, and it is hereby, reversed, and a judgment rendered declaring that Act unconstitutional.

REVERSED AND JUDGMENT RENDERED.

TORBERT, C.J., and JONES, SHORES and HOUSTON, JJ., concur.

MADDOX, J., concurs specially.

ALMON, J., concurs in the result.

ADAMS and STEAGALL, JJ., dissent.

MADDOX, Justice (concurring specially).

I concur completely with the opinion holding that Act No. 86-237 is unconstitutional under § 105, under this Court's decision in *Peddycoart*, cited in the majority opinion.

I do not believe it is necessary to distinguish *Baldwin County v. Jenkins*, 494 So.2d 584 (Ala.1986), which I thought was incorrectly decided, for the reasons I expressed in a dissent in that case; therefore, I concur specially.

STEAGALL, Justice (dissenting).

I respectfully dissent as to the majority opinion's reversal of the trial court's decision that Act No. 85-237 is valid and constitutional.

The Mobile County Commission was created on August 7, 1957, when the Alabama Legislature passed Act No. 181, Acts of Alabama 1957, a local act. The Act created the Mobile County Commission out of the existing board of revenue and road commissioners and provided for the election of its members, those members' terms of office, qualifications for that office, and various other requirements

dealing with that body, including the filling of vacancies when they occurred. That Act states specifically:

> "Vacancies on the commission shall be filled by appointment by the Governor, but the office of president of the commission shall be filled by the members thereof. Any person appointed to fill a vacancy shall serve the unexpired term, and until his successor is elected and qualified."

Act No. 181, § 2(b), Acts of Alabama 1957, at 234.

The local act being question here, Act No. 85-237, Acts of Alabama 1985, states, in regard to vacancies on the Mobile County Commission:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Act No. 85-237, Acts of Alabama 1985, at 137.

This Court has on several occasions upheld trial courts' rulings that a local act amending a local act is not unconstitutional. In *Freeman v. Purvis*, 400 So.2d 389 (Ala.1981), the Court upheld a trial court ruling which found that:

> "Act 80-797 passed in the 1980 regular session of the Legislature of Alabama, is a Local Act which amends a local act and is not unconstitutional."

400 So.2d at 390. The Court then stated: "Accordingly, the trial court was correct when it held that Act No. 797 was a local law which amended Act No. 710, a pre-existing local law." 400 So.2d at 392.

Local Act 85-237 is amendatory in nature, affecting the already-existing local legislation, which created the Mobile County Commission and provided for the filling of vacancies.

In *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala.1978), we stated, regarding legislation passed before and after that decision:

> "Henceforth when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it. With regard to legislation heretofore enacted, the validity of which is challenged, this Court will apply the rules which it has heretofore applied in similar cases."

354 So.2d at 814.

The effect of this passage was to say that the new standard established in *Peddycoart* as to the constitutionality of local legislation would be applied only prospectively. *Ex parte Bracewell,* 407 So.2d 845 (Ala.1979), *reversed on other grounds,* 457 U.S. 1114, 102 S. Ct. 2920, 73 L.Ed.2d 1325 (1982). Where, as here, we are looking at legislation enacted prior to *Peddycoart* but amended afterwards, this Court is required to apply the law as it stood before *Peddycoart.* That law can be found in the case of *Johnson v. State ex rel. City of Birmingham,* 245 Ala. 499, 17 So.2d 662 (1944):

> "Sec. 105 of the Constitution is not construed to inhibit local legislation on a subject not prohibited by the Constitution, merely because the local law is

different, and works a partial repeal of a general law."

245 Ala. at 503, 17 So.2d at 664, citing *Talley v. Webster*, 225 Ala. 384, 143 So. 555 (1932). This Court, in *Talley v. Webster*, in determining whether a statute violated Section 105 of the Constitution, stated: "We need not review the numerous cases construing this section. Suffice it to say it does not inhibit the passage of local laws on subjects, not prohibited by Section 104, merely because such local law is different, and works a partial repeal of the general law of the state in the territory affected." 225 Ala. at 385, 143 So. at 555.

In the case of *Norris v. Seibels*, 353 So.2d 1165 (Ala.1977), this Court reversed a judgment of the Alabama Court of Civil Appeals and held that a showing of specific legislative intent was necessary to effect any such repeal: "This general statute cannot be repealed by implication found in the local statute unless the legislative intent to effect such a repeal is clearly manifested." 353 So. 2d at 1167. This Court held that the language used in the questioned local statute contained no express repeal of the general statute. However, such is not the case here. Section 3 of Act 85-237, Acts of Alabama 1985, demonstrates a specific legislative intent by expressly repealing "[a]ll laws or parts of laws which are in conflict with this act."

Because I believe that Act 85-237, a local act, is amendatory in nature and therefore that the law to be applied is that existing prior to our decision in *Peddycoart*, supra, I believe the trial court's judgment should be affirmed.

ADAMS, J., concurs.

Supreme Court of Alabama.
Bob RILEY, as Governor of Alabama
v.
Yvonne KENNEDY et al.
1050087.

Nov. 9, 2005.
Rehearing Denied Nov. 15, 2005.

STUART, Justice.

Bob Riley, in his official capacity as Governor of Alabama, appeals a judgment of the Montgomery Circuit Court holding that a vacancy on the Mobile County Commission should be filled by a special election. We reverse and remand.

Facts

In an election held on September 13, 2005, Sam Jones, the county commissioner for district 1, Mobile County Commission, was elected to the office of mayor of the City of Mobile. On September 19, 2005, Yvonne Kennedy, James Buskey, and William Clark, registered voters in Mobile County and residents of district 1 (hereinafter referred to collectively as "Kennedy"), filed a pleading in the Montgomery Circuit Court containing the following: a complaint seeking a declaration as to whether Alabama law requires the vacancy in the district 1 seat on the County Commission to be filled by a special election; a petition for a writ of mandamus directing Don Davis, probate judge of Mobile County to conduct such a special election to fill the district 1 seat; and a request for an injunction prohibiting Governor Riley and the other defendants[1] from acting to the

[1] In addition to naming Governor Riley as a defendant, the complaint also named Don Davis, in his official capacity as probate judge of Mobile County; the Mobile County Commission; and Stephen Nodine and Mike

contrary.

According to the complaint, Governor Riley, through his legal advisers, had made public statements indicating that he would fill by appointment the vacancy created when Jones resigned his seat on the County Commission to assume the office of mayor. Kennedy averred that Governor Riley could not make such an appointment, because, she argued, Act No. 85-237, Ala. Acts 1985, requires that "a special election be held to fill the vacancy, and, if a special election is not held, [Kennedy] and other similarly situated registered voters of the County of Mobile will be disenfranchised and denied the opportunity to vote for a candidate of their choice to fill the vacancy mentioned."

Governor Riley answered the complaint, asserting that he is authorized by general law to fill the vacancy and that Act No. 85-237, Ala. Acts 1985, relied on by Kennedy, was declared unconstitutional by this Court in *Stokes v. Noonan*, 534 So.2d 237 (Ala.1988). Act No. 85-237, he argues, is therefore void, and it was not revived, as Kennedy argues, by the legislature's subsequent enactment of Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975.

On September 29, 2005, after hearing argument by counsel, the Montgomery Circuit Court, apparently giving a field of operation to Act No. 85-237, Ala. Acts 1985, held that the vacancy on the Mobile County Commission must be filled by a special election rather than by appointment by the Governor. On October 3, 2005, Sam Jones, the commissioner for district 1, resigned to assume the office of mayor of the City of Mobile. On October 11, 2005, Governor Riley appealed.

Standard of Review

Dean, in their official capacities as members of the Mobile County Commission. Governor Riley is the only defendant who appealed.

> "'This court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented.' *Scott Bridge Co. v. Wright*, 883 So.2d 1221, 1223 (Ala.2003). Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. *Carter v. City of Haleyville*, 669 So.2d 812, 815 (Ala.1995)."

Continental Nat'l Indem. Co. v. Fields, 926 So.2d 1033, 1034-35 (Ala.2005).

Discussion

Governor Riley contends that Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975, did not revive Act No. 85-237, Ala. Acts 1985, which this Court had held unconstitutional, see *Stokes v. Noonan*, and that, therefore, the trial court erred in declaring that the vacancy on the Mobile County Commission created by Jones's resignation should be filled by a special election.[2]

In *Stokes*, this Court addressed the constitutionality of Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by a special election when at least 12 months remained on the unexpired term of any commissioner. The registered voter challenging Act No. 85-237 in *Stokes* argued that Act No. 85-237, a local act, was subsumed by a general law, § 11-3-6, Ala. Code 1975, and, consequently, was unconstitutional under Art. IV, § 105, Alabama Constitution 1901.

Act No. 85-237 provided:

---

[2] We review this issue only as presented by these facts and by the parties' arguments regarding these facts; we do not address any other possible impediments that may exist to the constitutionality or enforceability of Act No. 85-237.

> "'Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.'"

534 So.2d at 238. We held that Act No. 85-237, applicable only to Mobile County, constituted a local law on the same subject as the previously enacted general law. We then considered § 11-3-6, Ala.Code 1975, which appears in Chapter 3, Title 11, of the Alabama Code pertaining to county commissions. It provided at the time we decided *Stokes:* "'In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed.'" 534 So.2d at 238. We recognized that § 11-3-6 is clearly a general law, a statewide statute addressing the filling of vacancies on county commissions throughout the State, and that the legislature did not in the language of § 11-3-6, Ala.Code 1975, manifest an intent to except the local law from the general law. Therefore, we held that Act No. 85-237 was contrary to § 11-3-6, Ala. Code 1975, and, consequently, that it violated Art. IV, § 105, Alabama Constitution 1901, which provides, in pertinent part: "No special, private, or local law ... shall be enacted in any case which is provided for by a general law." We reasoned that because the legislature did not in § 11-3-6, Ala. Code 1975, manifest an intent to except the local law from the general law, the contrary local law, in that case Act No. 85-237, must defer to the general law, §

11-3-6, Ala. Code 1975, and, consequently, we held, Act No. 85-237 violated Art. IV, § 105, Alabama Constitution 1901.

On May 14, 2004, Governor Riley approved Act No. 2004-455 and it became effective. Act No. 2004-455 amends § 11-3-6, Ala. Code 1975, to read as follows: "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala. Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones's resignation. We cannot agree with that conclusion because the language of Act No. 2004-455 does not clearly so indicate.

This Court has consistently held that

> "'statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction. *Sutherland Stat. Const.*, § 41.04 (4th ed 1984).'

"*Dennis v. Pendley*, 518 So. 2d 688, 690 (Ala.1987)."

Gotcher v. Teague, 583 So. 2d 267, 268 (Ala.1991). Moreover, although curative statutes are "of necessity" retroactive, *Horton v. Carter*, 253 Ala. 325, 328, 45 So. 2d 10, 12 (1950), even they are subject to the same rule of

statutory construction, i.e., they will not be construed as retroactive unless the intent of the legislature that the statute have such retroactive effect is clearly expressed. The act under consideration in *Horton* expressly provided: "This Act shall be deemed retroactive in its effect upon its passage and approval by the Governor or upon its otherwise becoming a law." 253 Ala. at 328, 45 So. 2d at 12. On numerous other occasions the legislature has demonstrated its ability to provide expressly for retroactive effect when enacting curative legislation. See, *e.g.*, § 34-8-28(h), Ala. Code 1975 ("The provisions of this amendatory section are remedial and curative and shall be retroactive to January 1, 1998."); § 11-50-16(c), Ala. Code 1975 ("The provisions of this section shall be curative and retroactive ...."); § 11-43-80(d), Ala.Code 1975 ("The provisions of this section shall be curative and retroactive ...."); and Act No. 2001-891, § 5, Ala. Acts 2001 ("It is the intent of the Legislature that this act be construed as retroactive and curative.").

Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala. Code 1975, provides for prospective application only, and that language must be given effect according to its terms. Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively. The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is "[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, *to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of the county commission.*" (Emphasis added.) The language "to authorize the Legislature ... to provide" the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies

prospectively only; consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment.

Conclusion

Based on the foregoing, we conclude that the trial court erred in holding that the vacancy on the Mobile County Commission should be filled by a special election. Its judgment so holding is, therefore, reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NABERS, C.J., and SEE, LYONS, HARWOOD, SMITH, BOLIN, and PARKER, JJ., concur.

WOODALL, J., concurs in the result.

MOTION

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(2)

No. 07-77

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IN THE

Supreme Court of the United States

Bob Riley, Governor of Alabama,
Appellant,

v.

Yvonne Kennedy, et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because appellant's notice of appeal was untimely filed.

2. Whether the Voting Rights Act requires preclearance before implementation of a judicial decision by a covered jurisdiction's highest court that forbids the continued use of an already precleared state law because that law is invalid under the state constitution.

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STATEMENT

In 1985, the Alabama legislature enacted legislation providing that vacancies on the Mobile County Commission be filled by special election rather than by gubernatorial appointment as was previously the practice. That legislation was precleared by the Attorney General, as required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and used in 1987 to fill the next vacancy that occurred on the Commission. The Alabama Supreme Court, however, subsequently held that the 1985 statute was invalid under the state constitution and, in two decisions, ordered that Mobile County return to filling vacancies by gubernatorial appointment. The district court below, relying on established § 5 principles, held that this change in practice required preclearance. Defendants did not timely appeal that judgment. Nine months later—when the district court granted a motion for further relief after the State failed either to obtain preclearance of the changes ordered by the state court or to remove the official illegally appointed to fill the most recent vacancy on the Commission—the Governor filed this appeal, challenging not the order for further relief, but the prior final judgment requiring preclearance. That appeal, in addition to being untimely, fails to raise any issue warranting plenary review by this Court.

1. Section 5 of the Voting Rights Act prohibits a covered jurisdiction—including the State of Alabama, *see* 42 U.S.C. § 1973b(b); 28 C.F.R. Pt. 51 App.—from enforcing any change in voting policy, practice, or procedure unless and until it has obtained preclearance from the Attorney General of the United

States or from the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973c. Section 5's preclearance requirement extends to all voting changes, including changing the method of filling government posts such as "changing from election to appointment." 28 C.F.R. § 51.13.[1] Moreover, because the "Act requires preclearance of *all* voting changes . . . there is no dispute that this includes voting changes mandated by order of a state court." *Branch v. Smith*, 538 U.S. 254, 262 (2003) (emphasis in original) (internal citations omitted).

Voting changes may be precleared only if the jurisdiction demonstrates that the change will not have the purpose or effect of denying or abridging minority voting rights. 42 U.S.C. § 1973c. Absent preclearance, changes to voting procedures are unenforceable. *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-50 (1969).

Affected citizens may bring suit under § 5 to obtain declaratory relief that a change is subject to preclearance and to enjoin implementation of any change that requires, but has not obtained, preclearance. *Allen*, 393 U.S. at 555. Appeal in such cases is available to this Court, so long as the party files a notice of appeal within sixty days of the final judgment. 42 U.S.C. § 1973c; 28 U.S.C. § 2101(b).

---

[1] In furtherance of his enforcement responsibilities under the Act, the Attorney General has promulgated regulations governing the administrative preclearance process. *See* 28 C.F.R. Pt. 51. "Given the central role of the Attorney General in formulating and implementing § 5, [his] interpretation of its scope is entitled to particular deference." *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 39 (1978).

2. When the Voting Rights Act was passed, vacancies on Alabama county commissions were filled by gubernatorial appointment, pursuant to a general state statute. J.S. App. 4a. In 1985, the Alabama legislature enacted local legislation to allow vacancies on the Mobile County Commission to be filled by special election. *See* Ala. Act No. 85-237 (reproduced at J.S. App. 4a). The State submitted the Act for administrative preclearance, which was granted by the Attorney General on June 17, 1985. Joint Stipulation of Fact, Docket No. 14, ¶ 3 & Ex. C (Jan. 13, 2006).

In 1987, a vacancy arose on the Mobile County Commission. Pursuant to Act No. 85-237, the County prepared to fill the vacancy through a special election. A county voter, Willie Stokes, filed suit, challenging the constitutionality of Act No. 85-237 on state law grounds. In particular, Stokes argued that the law conflicted with the prior general statute providing that vacancies were to be filled by gubernatorial appointment and, as a consequence, violated a state constitutional prohibition against local laws that conflict with general laws of statewide application. J.S. App. 17a-18a. The Circuit Court of Mobile County rejected that claim and allowed the special election to proceed. J.S. 7. Stokes appealed but did not obtain a stay of the election. *See id.* As a result, Sam Jones was selected by the voters of Mobile County for the post and assumed office in July 1987. J.S. App. 4a. Subsequently, on September 30, 1988, a divided Supreme Court of Alabama ruled that Act No. 85-237 violated the Alabama constitution as a local law in direct conflict with a statewide general law. *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988) (reproduced at J.S. App. 17a-24a). The result of the

decision was to require that future vacancies in Mobile County be filled by appointment. App. 4a.[2]

The State did not seek preclearance of the change in election practice ordered by *Stokes*. J.S. App. 4a. Rather, in 2004, the Alabama legislature amended the general law to allow county commission vacancies to be filled by special election when "a local law authorizes a special election." J.S. App. 5a (quoting Ala. Act No. 2004-455, amending ALA. CODE § 11-3-6).[3] The State submitted the 2004 legislation for preclearance by the Attorney General, who interposed no objection. *Id.*

The next vacancy on the Mobile County Commission arose in the fall of 2005, when Commissioner Jones was elected Mayor of Mobile, prompting him to resign from the Commission. J.S. App. 25a-26a. In anticipation of that vacancy, a group of voters (who are also the appellees in this case) filed a petition in state court seeking a declaration that a special election was required to fill the vacancy. J.S. App. 25a-26a. The Montgomery Circuit Court agreed and ordered a special election to be held. *Id.* at 26a. Governor Bob Riley, a defendant in the state-court action, appealed, arguing that a special election was not authorized under state law. In the Governor's view, the 2004 Act applied only when the legislature enacted a new "local law

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[2] The question of the validity of the 1987 election was avoided when the Governor designated Jones, the election's winner, as his appointee to the office. J.S. App. 4a.

[3] By amending the general law to allow for special elections when authorized by local legislation, the legislature sought to avoid any conflict between the general law and the local law permitting a special election in Mobile County. J.S. App. 29a.

authoriz[ing] a special election," Ala. Act No. 2004-455, after the effective date of the 2004 Act; the 1985 statute allowing special elections in Mobile County, he argued, did not qualify. The Alabama Supreme Court agreed, and once again ordered that vacancies on the County Commission be filled by appointment, rather than in accordance with the special election practice established under the 1985 Act. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005) (reproduced at J.S. App. 25a-31a).

Again, the State of Alabama did not seek preclearance of the court-ordered change in election practice. J.S. App. 5a. Instead, as it did in the aftermath of the prior *Stokes* decision, the Alabama legislature again enacted legislation to reinstate special elections as the method of filling vacancies on the Mobile Country Commission, readopting Act No. 85-237 "without change" and "reaffirm[ing] the Legislature's intention as set forth in that statute." Ala. Act No. 2006-342 § 2 (reproduced at App. 1a). The State submitted the 2006 Act to the Department of Justice for preclearance and the Attorney General interposed no objection. J.S. 6. Thus, from this point forward, all vacancies on the Mobile County Commission will be filled by special election.

After the *Riley* decision, the Governor appointed Juan Chastang to the vacant seat on the Mobile County Commission. J.S. App. 5a. On November 16, 2005, appellees filed this suit in the United States District Court for the Middle District of Alabama under § 5 of the Voting Rights Act, seeking to enjoin the appointment until the State had obtained preclearance for the use of this method to fill the vacancy on the Commission. J.S. 4. The case was

heard before a three-judge panel pursuant to 42 U.S.C. 1973c.

3. Agreeing with appellees, the district court held that preclearance was required, since the court-ordered practice of gubernatorial appointment constituted a change from the precleared practice of special elections. J.S. App. 3a-8a. The court rejected Governor Riley's assertion that there had been no "change" in election practice within the meaning of § 5. *Id.* at 7a. The court explained that "[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." *Id.* at 6a-7a (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997), and *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990)). While the Governor acknowledged that Act No. 85-237 had called for special elections, had received preclearance, and had been implemented to fill the 1987 vacancy, he nonetheless argued that it could not serve as the baseline practice for determining whether there had been a change because the State Supreme Court had subsequently invalidated the statute for state-law reasons. The three-judge court disagreed: "We are required to determine the baseline 'without regard for [its] legality under state law.'" J.S. App. 7a (quoting *City of Lockhart v. United States*, 460 U.S. 125, 133 (1983) (citing *Perkins v. Matthews*, 400 U.S. 379 (1971))). Because the decisions in *Stokes* and *Riley* ordered a practice different from that required under the precleared 1985 Act, the court held that the court-ordered changes required preclearance. J.S. App. 7a-8a.

Accordingly, on August 18, 2006, the district court ordered that "Judgment is entered in favor of plaintiffs . . . and against defendant Bob Riley" and ordered the State of Alabama to obtain preclearance in accordance with § 5. J.S. App. 9a. The court declined, however, to issue further injunctive relief at that time, providing instead that if the State failed to obtain preclearance within 90 days, "the court will revisit the issue of remedy." *Id.* The court entered final judgment, ordering that the "clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure." *Id.* at 10a.

4. Pursuant to 28 U.S.C. § 2101(b), the State had sixty days to appeal from that final judgment. It did not do so. Instead, the State sought administrative preclearance of the state court decisions. *See* Notice of Filing Preclearance Submission, Docket No. 30, Ex. A (Nov. 9, 2006). On January 8, 2007, Wan J. Kim, Assistant Attorney General for the Civil Rights Division, interposed an objection on behalf of the Attorney General. *See* Letter Denying Preclearance (reproduced at App. 2a).[4] Agreeing with the district court, the Department of Justice concluded that the appropriate baseline for § 5 purposes was the practice of holding special elections under Act No. 85-237—the last precleared voting practice to be in force and effect. *Id.* at 2. The Department then determined that the State had not met its burden of showing that the change to gubernatorial appointment was not retrogressive, finding that "[t]he transfer of electoral

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[4] The Attorney General has delegated his preclearance authority to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. § 51.3.

power effected by *Stokes v. Noonan* and *Riley v. Kennedy* appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission." *Id.* at 3. On March 12, 2007, the Department denied the State's request for reconsideration. *See* Letter Denying Reconsideration (reproduced at App. 9a).

After failing to receive administrative preclearance, the State was entitled to seek preclearance from the U.S. District Court for the District of Columbia, but it did not pursue that option.[5] And although preclearance of the process that produced Juan Chastang's appointment had been denied, the State did not remove Chastang from office. Accordingly, appellees petitioned the district court for further relief, and on May 1, 2007, the district court entered a remedial order vacating Chastang's appointment. J.S. App. 1a. The State then filed a notice of appeal to this Court on May 18, 2007. That appeal does not seek review of the order providing further relief, but rather requests reversal of the final order requiring preclearance, issued nine months earlier. *See* J.S. i.

5. Governor Riley requested that the district court stay its order vacating Chastang's appointment pending appeal to this Court. Emergency Mot. to Stay, Docket No. 49 (May 2, 2007). The court denied the motion. Order Den. Def's Mot. to Stay, Docket No. 52 (May 17, 2007). The Governor did not seek a stay from this Court and, as a result, the County held

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[5] In its jurisdictional statement, the State asserts that it may yet attempt to seek judicial preclearance, J.S. 6, but as far as appellees can determine, it has not yet done so.

a special election to fill the vacancy on October 9, 2007. Juan Chastang, who ran as the Republican nominee to retain his appointed seat, was soundly defeated by Merceria Ludgood, the Democratic Party's candidate, who won nearly 80 percent of the vote.[6]

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act requires that a covered jurisdiction obtain preclearance of all changes to its voting laws before those changes go into effect. 42 U.S.C. § 1973c. In this case, the State of Alabama adopted legislation that provided for the use of special elections to fill vacancies on the Mobile County Commission, obtained preclearance of that legislation, and actually conducted a special election under that legislation. The subsequent decisions of the Alabama Supreme Court in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), ordering the County to abandon that practice and providing instead that commission vacancies be filled through gubernatorial appointment, constituted a change affecting voting within the meaning of § 5, and therefore required preclearance.

The Governor's objections to the contrary cannot be reconciled with the decisions of this Court. The Court has repeatedly held that because § 5 "requires preclearance of *all* voting changes . . . there is no dispute that this includes voting changes mandated

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[6] *See* Certification of Results, Special Mobile County Election (Oct. 16, 2007) (*available at* http://records.mobilecounty.net/ViewImagesPDFAll.Aspx?ID=2007081288).

by order of a state court." *Branch v. Smith*, 538 U.S. 254, 262 (2003) (emphasis in original) (internal citations omitted). This is true even when a change is implemented to bring a jurisdiction's practice into compliance with state law. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971). The consequence of those rulings—that a State may sometimes be required to conduct elections for a time pursuant to a practice that violates state law—is a necessary consequence of Congress's decision to require preclearance of all voting changes, a decision that this Court has repeatedly found to be within Congress's constitutional authority. To adopt the Governor's contrary view would undermine the basic purposes of § 5 and lead to substantial problems of administration.

While the Court could easily dispose of this appeal by summary affirmance, it ultimately lacks jurisdiction to do so because the Governor's appeal is untimely. The district court entered final judgment in favor of appellees on the question of § 5 coverage on August 18, 2006. Although the court retained jurisdiction, and left open the possibility that it might entertain a motion for further relief if the State neither obtained preclearance nor removed Chastang voluntarily, neither fact rendered the judgment nonfinal. Nonetheless, the Governor did not appeal from the final judgment within sixty days, as required by statute, but waited until the Attorney General denied preclearance and the district court entered a supplemental order of further relief. As a result, while this Court would have jurisdiction to review the district court's choice of further remedy (which appellant does not challenge), it lacks

jurisdiction to review that court's prior final judgment finding the changes subject to preclearance.

ARGUMENT

I. The Present Appeal Is Untimely And Should Be Dismissed For Lack of Jurisdiction

A direct appeal to this Court must be taken within sixty days of a final judgment. *See* Sup. Ct. R. 18.1; 28 U.S.C. § 2101(b). Here, appellant challenges solely the district court's judgment that both *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), were decisions that "constituted changes that should have been precleared before they were implemented." J.S. App. 7a-8a.[7] That judgment became final on August 18, 2006, when the court conclusively resolved the merits of the appellees' complaint, ordered the Governor to obtain preclearance, and directed that its order be entered as the final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure. *Id.* at 9a-10a. Having failed to file its notice of appeal until May 18, 2007, nine months after entry of the final judgment,

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[7] The State does not seek review of the May 1, 2007 order setting aside the appointment of Juan Chastang. To the contrary, both Questions Presented in the Governor's Jurisdictional Statement go solely to the question whether the State was required to preclear the use of gubernatorial appointment to fill vacancies on the Mobile County Commission. *See* J.S. i (asking "1. Whether the decision of a covered jurisdiction's highest court . . . must be precleared" and "2. Whether the preclearance of a trial court's ruling . . . establishes a baseline such that the reversal of that decision . . . must be precleared").

the Governor cannot seek review of that judgment now.

The fact that the district court initially declined to vacate Chastang's appointment does nothing to undermine the finality of its judgment that preclearance was required. It is enough that the court made clear that it was "end[ing] the litigation on the merits," *Catlin v. United States*, 324 U.S. 229, 233 (1945). To be sure, the court left open the possibility of a post-judgment motion for further relief if the State failed to obtain preclearance and did not remove Chastang on its own. *See* J.S. App. 9a. But it is well established that a court's retention of jurisdiction to issue further relief, should a defendant's conduct warrant it, does not delay the finality of the judgment. *See, e.g.*, *French v. Shoemaker*, 79 U.S. 86, 92-93 (1870); *United States v. Local 30, United Slate Workers Ass'n*, 871 F.2d 401, 403 (3d Cir. 1989). Moreover, the fact that the district court subsequently exercised that jurisdiction to order further relief when the State neither obtained preclearance nor vacated the illegal appointment did not provide appellant an opportunity to take an otherwise untimely appeal from the initial judgment holding that preclearance was required. *See* 15B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3916 (2d ed. 1992)) (noting that an appeal from a postjudgment order "should not extend to revive lost opportunities to appeal the underlying judgment.");[8] *cf. also Boeing Co. v. Van Gemert*, 444 U.S. 472, 476, 479 n.5 (1980).

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[8] While an appeal may lie from a subsequent order of further relief, the "scope of appeal . . . should be restricted to the questions properly raised by the post-judgment motion." 15B

To treat a judgment resolving the § 5 coverage question as non-final unless and until the court issues further relief—if and when the jurisdiction fails to obtain preclearance and fails to remedy any unlawful action taken under the unprecleared change on its own—would be inconsistent with established § 5 practice and the purposes of the statute. This Court has routinely heard appeals in cases in which the three-judge court has done nothing more or less than what the district court initially did in this case—that is, declare that a change required preclearance and order that the change be precleared before implementation or enforcement of voting changes. *See, e.g.*, *City of Monroe v. United States*, 522 U.S. 34 (1997) (per curiam); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32 (1978); *Georgia v. United States*, 411 U.S. 526 (1973). In all of these cases, it was possible that an order for further relief might be appropriate if the jurisdiction failed to obtain preclearance and insisted on an unlawful course of action. But this Court did not delay review while the jurisdiction attempted to preclear the change. Instead, the Court took jurisdiction to review the final judgment determining that preclearance was, in fact, required.

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3916 (2d ed. 1992). *See, e.g.*, *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 594 (9th Cir. 1988) (holding that the plaintiffs' ability to challenge a 1988-1989 school desegregation assignment plan did not permit them also to attack a prior order issued in 1985); *Inmates of Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196, 1199-1200 (1st Cir. 1974) (finding that, on appeal from a supplemental order implementing the judgment by compelling specified steps, "the underlying judgment is immune from attack.").

That practice is compelled by the basic purposes of § 5. In enacting that provision, Congress recognized that it is important for § 5 cases to be resolved quickly because § 5's stringent remedy can freeze a covered jurisdiction's existing electoral practices into place until preclearance is obtained.[9] Moreover, Congress also recognized that voters within covered jurisdictions are entitled to be free from discriminatory changes in election rules and that swift resolution of § 5 claims is critical to this protection.[10] For that reason, rather than using standard adjudicatory procedures, § 5 provides an expedited system, bypassing ordinary circuit court review in favor of an initial hearing before a three-judge district court followed directly by review in this Court. *See* 42 U.S.C. § 1973c. Delaying review by this Court until a plaintiff obtains further relief in light of the jurisdiction's failure to obtain preclearance would substantially delay this expedited

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[9] The tight time limits for administrative proceedings before the Attorney General—which generally require him to resolve preclearance submissions within 60 days, *see* 28 C.F.R. § 51.42—likewise reflect a congressional sensitivity to the potential impact on a jurisdiction's self-governance.

[10] This case provides a textbook example of the problem § 5 was intended to address. Even with the expedited process provided by § 5, plaintiffs were represented for nearly one and a half years by a commissioner appointed under a procedure that the Department of Justice concluded had a discriminatory effect. Moreover, between the May 1, 2007, order of further relief and the special election of October 9, 2007, the residents of District 1 were denied representation on the County Commission altogether (a result recognized by the State in its Emergency Motion to Stay, Docket No. 49 (May 2, 2007), at ¶ 7).

process.[11] Such a rule would plainly not be in the interests of covered jurisdictions that reasonably desire immediate resolution of their obligation to preclear a challenged change before undertaking the time and effort of seeking preclearance. Where the correctness of an order requiring the defendant to seek preclearance is the principal issue in dispute, it would be illogical to delay this Court's review of that decision, possibly for several years, while potentially unnecessary preclearance proceedings take place.[12]

Thus, because the final judgment on the question whether preclearance was required was entered by the district court on August 18, 2006, and the notice of appeal was not filed until May 18, 2007, the appeal

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[11] The preclearance process already can often take several years, especially when a covered jurisdiction first seeks and fails to obtain preclearance from the Attorney General and then resorts to judicial preclearance in the District of Columbia. *See, e.g.*, *Beer v. United States*, 425 U.S. 130 (1976) (approximately six years between initial submission of a plan to the Attorney General and this Court's holding that city's plan was valid); *City of Richmond v. United States*, 422 U.S. 358 (1975) (four years). And even the streamlined administrative process is anticipated to take 60 days, *see* 28 C.F.R. § 51.42, and often takes up to 120 days in complex cases, *see id.* § 51.37.

[12] Indeed, delaying review can sometimes prevent a jurisdiction from ever obtaining review of the decision requiring preclearance. In this case, for example, while this litigation has been pending, the State amended and precleared a statute curing the defects identified in the State Supreme Court's decisions in *Stokes* and *Riley*, thereby ensuring that future Mobile County Commission vacancies will be filled by special election regardless of the outcome of this appeal. *See* Ala. Act No. 2006-342. It is only the possibility of reinstating the Governor's appointment of Juan Chastang to the Commission that prevents this case from being entirely moot.

is untimely, and must be dismissed for lack of jurisdiction.

II. Alabama Was Required To Seek Preclearance For The Changes In Voting Procedures Ordered By The Decisions In *Stokes v. Noonan* And *Riley v. Kennedy*

Even if the Governor's appeal is timely, it is plainly meritless.

Section 5 requires that Alabama seek preclearance for changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. "To determine whether there have been changes with respect to voting, [this Court] must compare the challenged practices with those in effect before they were adopted." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992).[13] As the court below noted, "[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." J.S. App. 6a-7a. (citing *Abrams v.*

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[13] This Court has made clear that once a change from the practice in force or effect on the date of § 5 coverage (for Alabama, November 1, 1964) has been precleared, any change from the precleared practice must itself be precleared before it can take effect. *See, e.g.*, *Presley*, 502 U.S. at 495. Only when there have not been "intervening changes [does] the Act require[] [this Court] to use practices in existence on November 1, 1964 as [its] standard of comparison." *Id.* For that reason, it makes no difference that the decision in *Stokes* "returned the State to its practice on its coverage date." J.S. 16. *See also* 28 C.F.R. § 51.12 (providing that preclearance is required for any change in voting practice, even one that "returns to a prior practice or procedure").

Johnson, 521 U.S. 74, 96-97 (1997)); *see also* 28 C.F.R. § 51.54(b)(1) ("the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.").

Here, it is undisputed that the effect of *Stokes v. Noonan* and *Riley v. Kennedy* was to adopt gubernatorial appointment as the method of filling vacancies on the Mobile County Commission, and that this is a change from the last precleared practice used to fill a Commission vacancy—special elections under Act No. 85-237. And for nearly forty years, it has been beyond dispute that converting offices from elected to appointed constitutes a change with respect to voting that requires preclearance under § 5. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 570 (1969); *see also* 28 C.F.R. § 51.13(i). The Governor nonetheless offers three reasons why the change from special election to gubernatorial appointment did not constitute a "change" within the meaning of § 5. None has any merit.

1. First, the Governor contends that a "decision by a covered jurisdiction's highest court that a precleared State Law is . . . invalid *as a matter of State law* is not a change that requires preclearance before it can be enforced." J.S. 12 (emphasis added). As a technical matter, it is not the court's *decision* that must be precleared; rather, it is the use of the election practice mandated by the court's decision that requires preclearance. In any event, that argument ignores this Court's decisions holding that a change in practice must be precleared even when it results from a state court order, and even when the change is required in order to bring a jurisdiction's procedures into compliance with state law.

In *Perkins v. Matthews*, 400 U.S. 379 (1971), this Court recognized that § 5 can require a jurisdiction to continue using a practice that violates state law unless and until a change is precleared. *Id.* at 394-95. In *Perkins*, the city of Canton, Mississippi, held its 1965 elections for alderman by ward—in violation of a state law that mandated at-large elections. In the next election, the city attempted to implement the at-large election scheme actually required by state law. This Court held that the use of at-large elections required preclearance, even though it was undertaken because the prior practice was illegal under state law. Whether legal under state law or not, the practice of election by ward was "in force and effect" on the coverage date and accordingly, this Court held, became the § 5 baseline. *Id.* at 395. This Court subsequently reaffirmed that principle in *City of Lockhart v. United States*, 460 U.S. 125 (1983), holding that in determining whether a change has a discriminatory effect, courts must determine the relevant baseline for comparison "without regard for the legality under state law of the practices already in effect." *Id.* at 133.

That the change to comply with state law in this case was ordered by a state court, rather than voluntarily undertaken by the jurisdiction as in *Perkins*, is of no consequence. Because the "Act requires preclearance of *all* voting changes . . . there is no dispute that this includes voting changes mandated by order of a state court." *Branch v. Smith*, 538 U.S. 254, 262 (2003) (emphasis in original) (citations omitted). Thus, for example, in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), officials in Winston County, Mississippi, declined to implement a 1964 state statute calling for election of school board

members by district, believing that the law violated the state constitution's prohibition against local legislation. *Id.* at 258. In 1979, the Mississippi Supreme Court excised the offending aspects of the 1964 legislation and ordered the County to begin holding elections by district. *Id.* at 259. This Court held that the use of districted elections required preclearance. *Id.* at 265 & n.16. The "presence of a court decree," the Court held, "does not exempt the contested change from § 5." *Id.* at 265 n.16. Moreover, it was "immaterial" that the change was required by state law or that the law predated the Voting Rights Act. *Id.* Section 5, the Court explained, "comes into play whenever a covered jurisdiction departs from an election practice that was '*in fact* in force or effect . . . on November 1, 1964.'" *Id.* (quoting *Perkins*, 400 U.S. at 395) (emphasis in original) (internal quotation marks omitted).

Abrams v. Johnson, 521 U.S. 74 (1997), cited by the Governor (J.S. 12-13), is not to the contrary. The dispute in *Abrams* arose when a federal three-judge court drew a redistricting plan to replace the legislative plan declared unconstitutional by this Court in *Miller v. Johnson*, 515 U.S. 900 (1995). Because the remedial plan was adopted by a federal court rather than the State, preclearance was not required. *Abrams*, 521 U.S. at 95; 28 C.F.R. § 51.18. Nonetheless, because this Court had previously instructed federal courts to avoid adopting plans with a discriminatory effect, it was necessary to determine whether the plan adopted in *Abrams* was retrogressive. *See* 521 U.S. at 96. In making that retrogression determination, this Court concluded that it would be inappropriate to compare the court-

ordered plan to the legislative plan held unconstitutional in *Miller*. *Abrams*, 521 U.S. at 96. Doing so, the Court noted, might "freeze in place the very aspects of a plan found unconstitutional." *Id.* at 97.

Abrams thus is irrelevant to this case for two reasons. First, *Abrams* did not even address the question presented here—what constitutes a change requiring preclearance under § 5. Because the remedial plan was developed by a federal court, preclearance was not required, *see id.* at 95, and, accordingly, there was no question before this Court regarding the scope of the preclearance requirement. Moreover, the Court said nothing to suggest that the State would not have been required to preclear any change from the unconstitutional plan, had the change been implemented by a state court or the state legislature, rather than a federal court. To the contrary, the Court reaffirmed that when a state changes its electoral system in order to remedy a constitutional violation, the change must be precleared unless the remedial plan is developed entirely by the federal court itself. *Id.*; *see also McDaniel v. Sanchez*, 452 U.S. 130 (1981); 28 C.F.R. § 51.18.

Second, and in any event, *Abrams* addressed only legislative plans that violate the *federal* constitution. *See* 521 U.S. at 97. A state plan that violates citizens' federal voting rights cannot be the benchmark for a retrogression analysis because treating the unconstitutional plan as a baseline would entrench unconstitutional practices the Voting Rights Act is designed to root out. The same is not true with respect to a practice that violates a state, but not

federal, constitutional provision, as this case demonstrates. Requiring Alabama to temporarily continue to enforce a state statute that violates the state constitution's prohibition against certain forms of local legislation in no way conflicts with the basic purposes of the Voting Rights Act.[14]

2. The Governor also cites *Young v. Fordice*, 520 U.S. 273 (1997), for the proposition that the 1985 Act mandating special elections was never in force or effect because it was "short-lived and was abandoned after its unlawfulness became apparent." J.S. at 14. But *Young* does not support that position. In *Young*, state officials sought preclearance of a *proposed* statute, but the statute was ultimately never enacted. 520 U.S. at 278-79. This Court held that the proposed statute did not constitute a baseline because "neither the Governor nor the legislature nor the state attorney general ratified the Provisional Plan." *Id.* at 282. The voting practice in *Young* was not "short-lived"—it was never born. By contrast, the

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[14] The Governor notes that a state law that violates the state constitution is "void," just like a state law that violates the federal constitution. J.S. 13. But this Court's decisions do not turn on whether the benchmark practice is "void." A county election practice is no less "void" when it violates a state statute than it is when it violates the state constitution, and this Court has repeatedly held that local practice in violation of state statutory law can be a § 5 baseline. *See Lockhart*, 460 U.S. at 132 ("The proper comparison is between the new system and the system actually in effect on [the coverage date], regardless of what state law might have required."); *Perkins*, 400 U.S. at 394-95. Whether void because of a conflict with a state statute or the state constitution, the abandonment of the illegal practice constitutes a change in a "standard, practice or procedure with respect to voting," and therefore requires preclearance. 42 U.S.C. § 1973c.

1985 Act at the center of this case, which required use of special elections to fill vacancies on the Mobile County Commission, was passed by the state legislature, signed into law by the Governor, precleared by the U.S. Attorney General, and actually implemented in the 1987 election.

That the practice was later "abandoned after its unlawfulness became apparent," J.S. 14, does not distinguish this case from *Perkins* or *Hathorn*. And, in fact, *Young* itself made clear that the "simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never 'in force or effect.'" 520 U.S. at 283. Instead, the question is whether the practice "would have been followed if the election had been held" on the date the new election practice was ordered. *Perkins*, 400 U.S. at 394. Because state statutes are presumed to be valid when enacted,[15] a statute should be deemed "in force or effect" from its effective date (or, if later, the date of preclearance) until repealed or declared invalid by a court. That Mobile County actually held a special election pursuant to the precleared 1985 statute law only serves to emphasize that the enacted statute was in force and effect prior to the decisions in *Stokes* and *Riley*.

3. The Governor further asserts that requiring preclearance of the changes instituted by *Stokes* and *Riley* "raises grave constitutional and workability concerns." J.S. 17. This assertion is also meritless.

Appellant's contention that the Department of Justice "has made State law and effectively

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[15] *See, e.g., State Bd. of Health v. Greater Birmingham Ass'n of Home Builders, Inc.*, 384 So. 2d 1058, 1061 (Ala. 1980).

commandeered State officials in violation of the Tenth Amendment," J.S. 17, is simply unfounded. The Department of Justice made no law in this case—it simply decided that the State had not carried its burden of demonstrating that the change from special elections to gubernatorial appointment would not have a discriminatory effect. To the extent the Governor is complaining that the State must keep in place a practice held invalid under state law, that effect is simply a consequence of § 5's preclearance requirement and the supremacy of federal law. *See* U.S. Const. art. VI, § 2.[16] "[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" *City of Rome v. United States*, 446 U.S. 156, 179 (1980). And this Court has repeatedly held that § 5 is a valid exercise of Congress' authority to enforce the Civil War Amendments. *See Lopez v. Monterey County*, 525 U.S. 266, 283 (1999) ("[W]e have specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States."); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (holding that barring changes under state law is "an appropriate means for carrying out Congress' constitutional

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[16] Alabama does not and cannot question the constitutionality of § 5 in this proceeding. Under 42 U.S.C. § 1973l(b) as interpreted in *Shaw v. Reno*, 509 U.S. 630, 637, 641 (1993), challenges to the Voting Rights Act's constitutionality must be brought before a three-judge District Court for the District of Columbia. Moreover, under 28 U.S.C. § 2403, a litigant challenging the constitutionality of a federal statute must provide notice to the Attorney General of the United States, a step not taken by Alabama here.

responsibilities and . . . consonant with all other provisions of the Constitution"); *see also City of Rome*, 446 U.S. at 178-82.

Nor does requiring state officials to conduct elections in compliance with § 5 constitute impermissible "commandeering" of state legislatures and executives as forbidden by this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Nothing in this Court's Tenth Amendment jurisprudence prevents Congress from passing a regulatory program that requires state compliance. "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Reno v. Condon*, 528 U.S. 141, 150-51 (2000) (internal quotation omitted). Like the statute at issue in *Condon*, § 5 "does not require the [Alabama] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. To the contrary, § 5 requires only that a state conduct elections in a way the *local jurisdiction* has chosen—the baseline practice—unless and until a change in election procedures is precleared.

Nor are the established preclearance principles applied in this case unworkable. The Governor complains that legislation may often be precleared and implemented—and therefore, any change from that practice may require preclearance—before the legislation can be declared invalid by a state court. J.S. 17. But that is simply a necessary consequence

of the legislative choice Congress made in enacting § 5 to require a state to keep in effect prior election practices unless and until any changes are precleared. The "argument that some administrative problems might arise in the future does not establish that Congress intended that §5 have a narrow scope." *Allen*, 393 U.S. at 564-65. In any event, states could minimize or avoid the problem identified by the Governor if they so chose. Many states, including Alabama, permit their state supreme courts to issue advisory opinions as to the constitutionality of a proposed bill. *See, e.g.*, ALA. CODE § 12-2-10. Or a state could delay the effective date of an act and provide for expedited judicial review of any challenge.

Even if those options were not ideal, the alternative the Governor proposes would create far greater administrative difficulties. Appellant would have this Court hold that state statutes do not become § 5 benchmarks until they are (1) duly enacted, (2) precleared, (3) subjected to state court challenge, and (4) upheld by the state supreme court. Under these criteria, few present voting practices would qualify as benchmarks. State-law challenges to election practices are not routine and are rarely brought immediately upon initiation of a voting practice. A practice may be implemented for many years before it is challenged—in *Hathorn*, for example, the state supreme court did not review the constitutionality of the Mississippi statute at issue in that case until 15 years after it was enacted, *see* 457 U.S. at 257-59. Or the practice may never be challenged at all before it is superseded, as may happen with respect to the location of polling places or election dates. In that event, the Governor provides no indication of what baseline would apply

(if any) or how the statute could effectively operate under his proposed construction. By contrast, the district court here followed a consistently applied bright line rule that has proven to be easily administrable in the federal courts: any duly enacted statute that receives preclearance becomes the baseline against which changes should be measured.

Finally, the rule established in this Court's precedents is compelled by the underlying purposes of § 5. When Congress enacted the Voting Rights Act, it recognized "that the unsuccessful remedies which it had prescribed in the past would have to be replaced by stronger and more elaborate measures in order to satisfy the clear commands" of the Civil War Amendments. *Katzenbach*, 383 U.S. at 309. Section 5 in particular was enacted to address the frequent problem that successful challenges to discriminatory voting practices "merely resulted in a change in methods of discrimination." *McCain v. Lybrand*, 465 U.S. 236, 243-44 (1984); *see also Katzenbach*, 383 U.S. at 311-12 (same). Accordingly, "[f]earing that covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination, Congress prohibited those jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5." *Hathorn*, 458 U.S. at 268. Under the Governor's view, however, covered jurisdictions actually retained their ability to change voting practices without preclearance simply by amending state statutes or the state constitution to render the current practice invalid under state law. A state could, for example, simply repeal the state law authorizing the practice, thereby rendering the current practice void under state law and, in the Governor's view, avoiding the need to preclear the

resulting change. The Congress that enacted § 5 would never have adopted "a 'voting rights' law containing a major and obvious loophole that would . . . threaten[] to destroy in practice the very promise of elementary fairness that the Act held out." *Morse v. Republican Party of Va.*, 517 U.S. 186, 236 (1996) (Breyer, J., concurring).

4. Appellant's second Question Presented—asking "[w]hether the preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal establishes a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced," J.S. i—simply does not arise in this case. Although a state probate judge did make a submission and obtain preclearance of the date of the recent special election, J.S. 9, the federal district court in this case did not base its decision in any way on that fact—indeed, the court's opinion does not even mention it. *See* J.S. App. 4a-5a. Instead, the district court held that preclearance was required because the state court decisions ordered an election practice (gubernatorial appointment) that was different from the baseline practice established by the 1985 Act calling for special elections. J.S. App. 7a.

That determination was manifestly correct and if this Court finds that it has jurisdiction, the district court's ruling accordingly should be affirmed. [17]

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[17] The Governor's claim to have done "nothing wrong," J.S. 18, is entirely irrelevant under § 5. The question in this § 5 coverage lawsuit is whether the State's change in voting procedures required preclearance, not whether the change has a discriminatory purpose or effect. That decision is confided either to the Department of Justice or to the United States

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be affirmed.

Respectfully Submitted,

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October 22, 2007

District Court for the District of Columbia. *Allen v. State Bd. of Elections*, 393 U.S. 544, 558-59 (1969); *see also Perkins v. Matthews*, 400 U.S. 379, 383-86 (1971). At any rate, the results of the recent special election—in which the Governor's appointee barely managed to garner twenty percent of the vote—undermines any suggestion that the change from election to appointment did not have a discriminatory effect on voting.

APPENDIX

ENROLLED, An Act,

Relating to Mobile County; prescribing procedure for filling certain vacancies on the county commission.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Whenever a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than 60 days and no later than 90 days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.

Section 2. The purpose of this act is to reenact Act 85-237 of the 1985 Regular Session (Acts 1985, p. 137) without change and to reaffirm the Legislature's intention as set forth in that statute.

Section 3. All laws or parts of laws which conflict with this act are repealed.

Section 4. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

January 8, 2007

Mr. Troy King
Attorney General
Mr. John J. Park, Jr.
Assistant Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Messrs. King and Park:

This letter refers to the change in method of selection for filling vacancies on the Mobile County Commission from special election to gubernatorial appointment in Mobile County, Alabama, pursuant to decisions of the Alabama Supreme Court in *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as amended. This matter arises from an order entered on August 18, 2006, by a three-judge

panel in *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), ruling that the State of Alabama submit the two decisions for preclearance under Section 5. We received your submission on November 9, 2006.

We have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race. *Georgia v. United States*, 411 U.S. 526 (1973). *See also* Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.52. "A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively." 28 C.F.R. § 51.54(a) (citing *Beer v. United States*, 425 U.S. 130, 140-42 (1976)).

Pursuant to Act No. 85-237, a vacancy on the Mobile County Commission is to be filled through popular election by the voters within the relevant single-member district. That statute was precleared by the Attorney General under Section 5 on June 17, 1985 (File No. 1985-1645), and was first implemented in a 1987 District 1 special election. Pursuant to decision of the Alabama Supreme Court in *Stokes v. Noonan*, that method of filling vacancies was changed

from election by the voters of the district to appointment by the Governor of Alabama in 1988, and reaffirmed by *Riley v. Kennedy* in 2005.

Pursuant to the decision of the three-judge federal panel in *Kennedy v. Riley*, the State has submitted the changes effected by *Stokes v. Noonan* and *Riley v. Kennedy* for review under Section 5 of the Voting Rights Act. Additionally, we understand that Alabama law has changed, legislatively reversing the decision in these cases and restoring the authority to fill vacancies to the voters themselves for future elections. This is the effect of Act No. 2006-342, which was signed by the Governor on April 12, 2006, and which would govern all future vacancies. The question before us, therefore, is limited to whether the change effected by *Stokes v. Noonan* and *Riley v. Kennedy* will lead to impermissible retrogression, caused by the appointment, rather than election, of an individual to fill a vacancy on the Mobile County Commission for a term expiring in 2008.

In evaluating whether a change affecting voting will lead to impermissible retrogression, the Attorney General compares the submitted change to the practice or procedure in effect at the time of the submission. 28 C.F.R. § 51.54(a). In light of your submission, we note that a change brought about by a state court decision is subject to Section 5. *Branch v. Smith*, 538 U.S. 254, 262 (2003). A practice or procedure that is not legally enforceable under Section 5 cannot serve as a benchmark; the comparison is with the last legally enforceable practice or procedure used by the jurisdiction. *Id.*

Changes that are not precleared are not enforceable. 42 U.S.C. § 1973c; *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982); *Clark v. Roemer*, 500 U.S. 646, 652 (1991). Because the changes pursuant to *Stokes* and *Riley* were never precleared, they cannot serve as the benchmark. *See Kennedy*, 445 F. Supp. 2d at 1336, (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997)); *Gresham v. Harris*, 695 F.Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990). The benchmark is determined without regard to its legality under state law. *Kennedy*, 445 F. Supp. 2d at 1336 (citing *City of Lockhart v. United States*, 460 U.S. 125, 132-133 (1983)); *Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971).

Thus, the last precleared procedure for filling vacancies in the Mobile County Commission that was in force or effect was the special election method set forth in Act No. 85-237. *Kennedy*, 445 F. Supp. 2d at 1336. This Act remains in full force and effect, as it affects voting, was precleared, and was implemented in the 1987 special election cycle. *See Young v. Fordice*, 520 U.S. 273, 282-83 (1997); *Lockhart*, 460 U.S. at 132-33. It is therefore the benchmark against which we measure the proposed change to fill vacancies by appointment of the Governor of Alabama.

The measurement is straightforward. As a result of litigation under the Voting Rights Act, Mobile County is governed by the three-member Mobile County Commission, the members of which are elected from single-member districts. *Brown v. Moore*, Civ. Act. No. 75-298-P (S.D. Ala. 1976)

(unpublished opinion). One of the single-member districts, District 1, is over sixty-three percent African-American in population and registered voters. The African-American voters of District 1 enjoy the opportunity to elect minority candidates of their choice to the County Commission; indeed, they enjoyed it in the 1987 special election in which Act 85-237 was first implemented. There is no dispute that the change would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters of District 1. Attorneys General have on at least ten occasions previously interposed objections to changes in method of selection from election to appointment in Alabama and elsewhere. For instance, in 1971, the Attorney General objected to Act No. 2445 of the Alabama Legislature, which changed the method of selection of judges of Justice of the Peace Courts in Alabama from election to appointment. Letter of David L. Norman, Assistant Attorney General, Civil Rights Division, to Hon. William J. Baxley, Attorney General, State of Alabama, Dec. 26, 1973.

The transfer of electoral power effected by *Stokes v. Noonan* and *Riley v. Kennedy* appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission. We have received no indication that the voters of District 1 would have selected the particular individual selected by the Governor. Under these circumstances, the State has failed to carry its burden of proof that the change is not retrogressive. On behalf of the Attorney General, therefore, I must interpose an objection to the change in method of

selection for vacancies occurring on the Mobile County Commission from special election to gubernatorial appointment.

We note that under Section 5, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 28 C.F.R. § 51.44. In addition, you may request that the Attorney General reconsider the objection. *See* 28 C.F.R. § 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the method of selection for vacancies on the Mobile County Commission by gubernatorial appointment will continue to be legally unenforceable as a matter of federal law. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

We also have been advised, as suggested above, that the State has, in essence, re-enacted the provisions of Act No. 85-237 in Act No. 2006-342, which similarly provides that future vacancies on the Mobile County Commission will be filled by special election. To the extent that Act No. 2006-342 does not change the voting practices and procedures set forth in Act No. 85-237, it need not be submitted for Section 5 review. We respectfully request your advice as to whether changes covered by Section 5 are contained in the 2006 law. In the meantime, special elections may be held pursuant to Act No. 85-237.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alabama plans to take concerning this matter. If you have any questions, please call Robert Lowell (202-514-3539), an attorney in the Voting Section. Because this matter has been the subject of pending litigation in *Kennedy v. Riley*, we are serving copies of this letter by facsimile transmission to the Court and counsel of record.

Sincerely,

/s/ Wan J. Kim

Assistant Attorney General

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 12, 2007

Mr. Troy King
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Mr. John J. Park, Jr.
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Dear Messrs. King and Park:

This letter refers to your January 30, 2007 request that, under 28 C.F.R. § 51.45, the Attorney General reconsider his objection to the change in method of selection for filling vacancies occurring on the Mobile County Commission from special election to gubernatorial appointment in Mobile County, Alabama, pursuant to decisions of the Alabama Supreme Court in *Stokes v. Noonan*, 524 So.2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as amended. We received your request on January 30, 2007.

We have carefully considered all of the information contained in your reconsideration request. Under Section 5, whether considering an initial submission or a request for reconsideration, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race. *Georgia v. United States*, 411 U.S. 526 (1973). See also *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. § 51.52. "A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively." 28 C.F.R. § 51.54(a), *citing Beer v. United States*, 425 U.S. 130, 140-142 (1976).

As an initial matter, we note that the State's reconsideration request contains no new factual information that impacts the retrogression inquiry. Pursuant to Act No. 85-237, a vacancy on the Mobile County Commission is to be filled through popular election by the voters within the relevant single-member district. Pursuant to decisions of the Alabama Supreme Court in *Stokes v. Noonan* and *Riley v. Kennedy*, that method of filling vacancies was changed from election by the voters of the district to appointment by the Governor of Alabama. The Attorney General interposed his objection because the change in method of filling vacancies from election to appointment, as applied here, has the

effect of denying the minority voters of majority-black Mobile County Commission District 1 the ability to elect a candidate of choice when a vacancy occurs.

In your request for reconsideration, you raise six primary arguments to support your contention that the objection was inappropriate: that the use of Act No. 85-237 as a benchmark is incorrect on the grounds that Act No. 85-237 was never "in force or effect"; that the objection is an unjustified intrusion into state sovereignty; that the objection evinces a general disapproval of changes from election to appointment; that *Stokes v. Noonan* and *Riley v. Kennedy* are based on generally applicable, race-neutral principles; that the individual selected by the Governor of Alabama is African-American; that it is impossible to prove that that individual would not have been the candidate of choice of District 1 voters; and that Alabama is now left without a mechanism for filling vacancies on the Mobile County Commission, because Act No. 2006-342 is not immediately enforceable. Each of these arguments has already been dealt with by the three-judge panel of the United States District Court for the Middle District of Alabama that decided *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), by the Attorney General in the January 8, 2007, objection letter, or by both. Nevertheless, for the sake of clarity, we shall address each of your arguments seriatim.

Regarding the use of Act No. 85-237 as the benchmark against which we measure retrogression, the use of a procedure as a benchmark does not depend on the legality of that procedure under state

law. The Supreme Court specifically has clarified that a pre-existing procedure that violates state law must still be used as a benchmark. In *Perkins v. Matthews*, 400 U.S. 379 (1971), Canton, Mississippi, was required by a 1962 (pre-Voting Rights Act) state law to change to at-large elections for its city council. Canton illegally continued to use a district system in its (post-Act) 1965 elections. Even though the district system violated state law, the Court held that the district system served as the benchmark because "the procedure in fact 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards." *Id.* at 395. Similarly, in *City of Lockhart v. United States*, 460 U.S. 125 (1983), the Supreme Court held that "[t]he proper comparison is between the new system actually in effect on [Section 5 the coverage date] regardless of what state law may have required." *Id.* at 132 (citing *Perkins*).

Following the Supreme Court's guidance, the District Court held that "[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." *Kennedy v. Riley*, 445 F. Supp. 2d at 1336 (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997); *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990)). It is not contested that Act No. 85-237 was precleared by the Attorney General; what is at issue is whether it was "in force or effect." As the case law indicates, the Act remains in full force and effect because it was implemented in an election cycle. The three-judge panel duly found this fact dispositive, stating that "Act No. 85-237 was

. . . put into force and effect with the election of [Samuel] Jones in 1987[.]" *Kennedy v. Riley*, 445 F. Supp. 2d at 1336. Indeed, no other steps could have been taken than were in fact taken to put the election method into force or effect. Accordingly, we see no basis on which we could depart from the determination of the three-judge panel, and of this Department, that Act No. 85-237 was in fact put into force and effect with the election of Mr. Samuel Jones in 1987. Act No. 85-237, therefore, is the proper benchmark for measuring potential retrogression.

We are aware of no court decision, and your letter cites none, in which a court has held that a practice was not "in force or effect" where an election was held under that practice. Your reliance on *Young v. Fordice*, 520 U.S. 273 (1997), is misplaced. *Young* involved a provisional voter registration plan that had not been enacted by a state legislature, that was only in use for forty-one days, and that was only utilized by a third of the state's registrars. Moreover, and critically, no election was conducted or imminent under that voter registration plan. *Young*, 520 U.S. at 282-83. Under those circumstances, the Court held that the plan remained a work in progress and was not in force or effect. *Id.* at 283. In contrast, here, as in both *Perkins* and *Lockhart*, elections had been held under the questioned practices.

Your letter also relies on your assertion that appointment is the longstanding norm in Alabama. This assertion is at odds with many recorded instances in Alabama in which vacancies have been filled by election rather than appointment. In any event, your letter cites no legal authority establishing

why such a practice or tradition is important to the legal analysis required in the Voting Rights Act. Indeed, the longstanding and persistent nature of some discriminatory practices was a reason for the enactment of Section 5. The law is clear: under Section 5, once a gain in voting rights is established as a benchmark, retrogression from that benchmark is prohibited. *Beer v. United States*, 425 U.S. 130, 141 (1976).

Your letter also urges that this objection unjustifiably intrudes into Alabama's sovereignty and the role of the Alabama courts, and contends that a "state statute within the scope of Section 5 must be both valid as a matter of state law and precleared if it is to be enforceable." Recons. Req., at 16. You provide no support for this argument other than your trial brief in *Kennedy v. Riley*, which was unanimously rejected by a federal three-judge panel. It is uncontroverted that a Section 5 change may be brought about by seeking to implement state court decisions. *Branch v. Smith*, 538 U.S. 254, 262 (2003). The Supreme Court has ruled on numerous occasions that the authority, pursuant to Section 5, to bar the implementation of a change under state law is an "appropriate means for carrying out Congress' constitutional responsibilities and . . . [is] consonant with all other provisions of the Constitution. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). "Principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state

sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980). *See also Katzenbach*, 383 U.S. at 334-35.

As such, the fact that the proposed change would be generally applicable is not legally dispositive. All changes are analyzed under the same fact-intensive, context-specific framework to determine whether they comply with the Section 5 retrogression standard. The Attorney General's objection is based on the State's failure to establish the absence of such an effect.

Your letter also urges that the fact that the individual appointed to the Mobile County Commission District 1 seat is African-American demonstrates a lack of discrimination in the selection. The Voting Rights Act, however, looks to the opportunity of the voters to choose a candidate of their choice, and not to the race of the person chosen. It does not set aside certain positions based on race. "[A] minority preferred candidate may be a non-minority. Conversely, a candidate is not minority-preferred simply because the candidate is a member of the minority." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 551 (9th Cir. 1998) (internal citations omitted).

Our conclusion that the individual appointed by the Governor would not have been the candidate of choice of District 1 voters is supported by interviews with experts on Mobile politics, including officials of both parties, and neutral political scientists whom we have independently contacted. Further, as we explained in our objection letter, the evidence

establishes that electoral choices of the voters of Mobile County Commission District 1 regularly differ from the choices of voters in the State of Alabama as a whole, who elect the Governor of Alabama. Your letter presents no information – such as election returns, statements from experts or community leaders, details of the involvement of elected officials or advocates in the selection of an appointee for the position, instances in which a substantially similar constituency has elected this individual to office, or other information – to contradict the evidence adduced during our investigation. Hence, the uncontroverted evidence before us makes clear that the effect of the implementation of *Stokes v. Noonan* and *Riley v. Kennedy* is to lead to a retrogression in the position of the African-American citizens of Mobile County Commission District 1 with respect to their opportunity to elect the candidate of their choice.

In the absence of facts supporting your claim that the instant change would not be retrogressive, your letter states that our objection evinces a policy of blanket disapproval of changes from election to appointment, and that we would never, for example, permit a change in the manner of selecting judges from election to appointment. That is simply incorrect. You will recall our June 29, 2006, letter precleaning Act No. 2006-355, which changed the method of filing a new judgeship from the longstanding practice of election to appointment by the Governor. Indeed, in 1999, we precleared precisely the type of change suggested in your reconsideration request, a Florida statute permitting jurisdictions to adopt a "Missouri Plan" system of

judicial selection that involved initial appointment and retention elections. We have precleared many changes from election to appointment for judges and other positions. We look at the reality of each change as it affects the opportunity of minority citizens to participate effectively in the political process. "[A]ny assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003). That assessment remains unchanged in this instance.

Under these circumstances, I must, on behalf of the Attorney General, decline to withdraw the January 8, 2007 objection to the change in method of selection for filling vacancies occurring on the Mobile County Commission from special election to gubernatorial appointment in Mobile County, Alabama, pursuant to the *Stokes v. Noonan* and *Riley v. Kennedy* decisions.

As we previously advised, you many seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. We remind you that unless such a judgment is rendered by that court, the objection by the Attorney General remains in effect and the proposed change continues to be legally

unenforceable. See *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10.

Finally, we note that you have contended that if the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* are not precleared, you will be left without a mechanism for filling vacancies on the Mobile County Commission that is both precleared and valid as a matter of state law. Both Act No. 85-237 and Act No. 2006-342 provide this authority – Act No. 85-237 because it remains in force in the absence of authority to implement the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* because they have not been precleared, and Act No. 2006-342 inasmuch as it simply reaffirms that special elections are to take place when vacancies occur. Only changes in "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting" fall within the purview of Section 5. 42 U.S.C. § 1973c(a). Thus, if an enactment has not brought about a change, it need not be submitted for Section 5 review. If Act No. 2006-342 only reaffirms the most recent practice that is both precleared and in force or effect, *i.e.*, Act No. 85-237, it need not be submitted for review under Section 5. If Act No. 2006-342 effects changes, we will be happy to review them under Section 5 on an expedited basis. Meanwhile, the special election provisions of Act No. 85-237 must be used for Commission vacancies.

If you have any questions, you should call Mr. Robert Lowell (202-514-3539) of our staff. Please refer to File No. 2006-6792 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Wan J. Kim

Assistant Attorney General

OPPOSITION BRIEF

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FILED
NOV 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 07-77

In the

Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OF HONORABLE BOB RILEY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ALABAMA, IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION

Section 5 prohibits a covered jurisdiction, like Alabama, from "enact[ing] or seek[ing] to administer any . . . standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, absent preclearance. Voting changes are measured against the statutory baseline practice, unless that baseline has moved. This case presents the question whether a letter from the United States Department of Justice interposing no objection to an unconstitutional local law advances the baseline, and freezes it. The district court erroneously held that it did so, thereby preventing the State from abandoning its unconstitutional practice, absent a second preclearance letter.

Applying Section 5 involves a delicate balancing of State and federal power. For a voting change to be legally enforceable, it must be precleared, and it must also be valid under applicable State law. If that were not so, election officials could adopt unconstitutional practices and, as long as USDOJ interposed no objection, commandeer the State Constitution. The district court's decision upsets the delicate balance, making Section 5 more vulnerable to a constitutional challenge.

1. Given the statewide applicability of the Alabama Supreme Court's decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, there is no basis for the Kennedy Appellees' suggestion that this appeal borders on moot. M.D.A. 15, n.12. This litigation, and the decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, arose in Mobile County, but their consequences do not end there. While the State's initial submission for preclearance limited the scope of the change submitted to the Mobile County Commission, *see* Notice of Filing Preclearance Submission, Docket No. 30, Ex. A at 6 (Nov. 9, 2006), the request for reconsideration made it abundantly clear that *Stokes v. Noonan* and *Riley v. Kennedy*, "like all decisions of [the Alabama Supreme] Court, are

applicable throughout the State," *see* Status Report of Governor Riley, Docket No. 42, Ex. A at 2, 14 (Jan. 30, 2007).

Similar local laws in Jefferson County, Randolph County, Houston County, and Etowah County were identified during this litigation, as was a *sui generis* Macon County local law. Status Report of Governor Riley, Docket No. 42, Ex. A at 8 (Jan. 30, 2007); Trial Brief of Governor Riley, Docket No. 16 at 2 n.2 (Feb. 3, 2006). The Kennedy Appellees relied on a vacancy in the Etowah County Commission "[t]o see the nature of the 'change' wrought by the *Riley v. Kennedy* decision." Plaintiff's Trial Brief, Docket No. 15 at 3 (Jan. 20, 2006).[1] They noted an Attorney General's opinion concerning a Houston County vacancy in support of their argument that "the Alabama Supreme Court's interpretation of Act 2004-455 [in *Riley v. Kennedy*] has statewide application." Plaintiffs' Trial Brief in Reply, Docket No. 17 at 4-5 (Feb. 10, 2006).

The vacancies in Etowah County and Houston County have passed, but a vacancy is imminent in Jefferson County. The underlying facts and legal situation are not identical each time a vacancy arises. Nonetheless, a showing that the preclearance status of that *Stokes v. Noonan* and *Riley v. Kennedy* is moot has not been made.

Moreover, the fundamental question of whether Alabama Supreme Court decisions holding State statutes unconstitutional require preclearance is one of continuing importance. That Court now has before it another constitutional challenge to a precleared Act.

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[1] "In Mobile County, the decision in *Riley v. Kennedy* continued the status quo established by *Stokes v. Noonan*." J.S. 16. Before and after *Riley v. Kennedy*, vacancies in the Mobile County Commission were to be filled by gubernatorial appointment on the strength of *Stokes v. Noonan*. Under State law, that scenario held true until the passage of Act No. 2006-342, which essentially re-enacted Act No. 85-237. *See* J.S. 12, n.5; M.D.A. 5 & App. 1a.

2. The Kennedy Appellees misread the district court's August 2006 Order, finding finality where there was none. They assert "[t]he the judgment became final on August 18, 2006, when the court conclusively resolved the merits of the appellees' complaint, *ordered the Governor to obtain preclearance*, and directed that its order be entered as a final judgment." M.D.A. 11 (emphasis added). In fact, the district court never "ordered the Governor to obtain preclearance," M.D.A. 11, or to do anything else, notwithstanding the Kennedy Appellees' repeated assertions to the contrary. *See* M.D.A. 7 ("the district court . . . *ordered the State of Alabama to obtain preclearance in accordance with § 5*") (emphasis added); M.D.A. 13 ("This Court has routinely heard appeals in cases in which the three-judge court has done nothing more or less than what the district court initially did *in this case*—that is, declare that a change required preclearance *and order that the change be precleared before implementation of voting changes.*") (emphasis added; citing cases in which injunctions issued).[2]

Here, no injunction has ever issued against Governor Riley. The district court's August 2006 Order stated:

> The plaintiffs suggest *rather than enjoin enforcement of Stokes v. Noonan and Riley v. Kennedy*, or otherwise consider taking any action regarding the appointment of Juan Chastang to the Mobile County Commission, we should give the State 90 days to obtain the necessary preclearance. We agree. An appropriate judgment will enter.

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[2] *City of Monroe v. U.S.*, 522 U.S. 34 (1997) (per curiam) *reversing U.S. v. City of Monroe*, 962 F. Supp. 1501, 1520 (M.D. Ga. 1997) (three-judge court) ("Accordingly, an order will issue providing the injunctive relief requested."); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 36 (1978) ("The District Court therefore enjoined enforcement of Rule 58 pending compliance with the preclearance requirements of § 5."); *Georgia v. U.S.*, 411 U.S. 526, 528 (1973) ("the District Court issued the requested injunction").

J.S. App. 8a (emphasis added; paragraph break omitted). The Judgment gave Governor Riley an opportunity—not a command—to seek preclearance. It provided:

> (2) The State of Alabama has 90 days from the date of this order to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c; if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy. Defendant Riley is to keep the court informed of what action, if any, the State decides to take and the result of that action.

J.S. App. 9a-10a. When USDOJ denied preclearance, the district court completed the *City of Lockhart* analysis, *see* J.S. 2, concluding the core proceedings of this litigation with an order vacating the appointment of Juan Chastang, J.S. App. 1a-2a.

The Kennedy Appellees contend that "[i]t is enough that the court made clear that it was 'end[ing] the litigation on the merits,' *Catlin v. United* States, 324 U.S. 229, 233 (1945)." M.D.A. 12. Admittedly, the district court entered judgment for Kennedy Appellees, and directed the clerk to close the case. *See* J.S. App. 9a-10a. Still, given that no injunction had been entered and the Governor was to report to the Court on any preclearance proceedings, it was far from "clear that [the court] was 'end[ing] the litigation on the merits.'" M.D.A. 12 (quoting *Catlin*, 324 U.S. at 233).

In any event, the language that the Kennedy Appellees quote from *Catlin* does not support the proposition they advance, namely that clarity from the court would be dispositive. Instead, what *Catlin* said is: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. Here, the litigation was not resolved; it was in limbo, awaiting a preclearance determination.

The Kennedy Appellees also assert that policy requires the Governor protect the State's interests on their timetable by appealing the district court's August 2006 Order. M.D.A. 14-15. In support of this argument, they cite only Section 5 itself, which clearly calls for a three-judge district court and a direct appeal to this Court, but does not say why that procedure was adopted.[3] M.D.A. 14-15; J.S. App. 14a-15a. The Kennedy Appellees provide no citations in support of their position that the particular policy concerns they advance are the ones that motivated Congress. Moreover, they seem unconcerned with lengthy delay in these proceedings that would have resulted from an early appeal. Had administrative preclearance been timely forthcoming—as it should have been—the administrative preclearance route would have proven shorter than an appeal to this Court.

Governor Riley's appeal was timely. This Court has jurisdiction to resolve the important questions presented by this appeal.

3. The Kennedy Appellees' attempt to assuage the constitutionality concerns inherent in their position by suggesting that it is not the decisions of the Alabama Supreme Court that must be precleared—but their implementation—misses the mark. M.D.A. 17 ("As a technical matter, it is not the [C]ourt's *decision* that must be precleared; rather it is the use of the election practice mandated by the [C]ourt's decision that requires preclearance."). They cite no authority for their point and they offer no logic. They say it and move on, apparently hoping to casually mitigate the image of a federal official holding the authority to trump the otherwise Supreme power of a State's highest Court to say what the law of that State is.

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[3] *Cf. Webber v. White*, 422 F. Supp. 416, 424 (N.D. Tex. 1976) ("The Senate Report contains a fairly detailed analysis of the history and purpose of the three-judge court acts. It notes that the purpose for requiring three judges in cases where the federal injunctive power might be used to enjoin state statutes and regulatory programs was for the states' benefit.").

In fact, the intrusive nature of the construction of Section 5 put forward by the Kennedy Appellees in this case cannot be overstated.

The Kennedy Appellees elucidated on their position during oral argument before the district court, saying:

> Court decrees, of course, can be considered to be changes, and I find that a *useful* way to think about court changes -- excuse me -- court decrees, that is *state court decrees as being the seed for a change* is to think of it *not that it's the Court making the change*, but rather the law says that any time a state official seeks to administer a change, it has to be precleared. And it's the seeking to administer it that is the triggering event, I think, for purposes of Section 5 of the Voting Rights Act. *I think that avoids the problem that [counsel for Governor Riley] raises that this amounts to a federal interference with the state court system or imposition on the state's Tenth Amendment rights or something like that.*

Transcript, Oral Argument Before A Three Judge Panel, 4-5 (March 29, 2006) (emphasis added). In other words, the asserted characterization is "useful" in wedging judicial decisions into the language and construct of § 5 [4], and it may

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[4] *Cf. Branch v. Smith*, 538 U.S. 254, 264 (2003) ("An 'enactment' is the product of legislation, not adjudication.") (citing dictionaries); *Webber v. White*, 422 F. Supp. 416, 427 (D.C. Tex. 1976) ("The Act, itself, in 42 U.S.C. s 1973c, uses the terms 'shall enact' and 'seek to administer.' The limitation of the applicability of this section to legislative, executive, and administrative actions is self-evident from the use of these terms. The legislative history of s 5 of the Voting Rights Act of 1965 indicates that Congress feared the ingenuity of those in legislative and executive positions who were bent on preventing Blacks from voting. There is no indication in the legislative history that Congress sought the Attorney General's review of state judicial law-making.") (citations omitted). *But see Branch*, 538 U.S. at 265 (where a State Court drew a redistricting plan because the Legislature had not, the

promote denial of any constitutional concerns that such action might otherwise invoke.

In reality, this construction is equally dangerous in its own way. It begins with the proposition that the constitutional decisions of the Alabama Supreme Court have no force of their own. From there, the Kennedy Appellees move to the proposition that whenever State or local officials are "encouraged" by a decision of the Alabama Supreme Court to make a change with respect to voting, it is that change that requires preclearance. What that change is as a factual matter may be different throughout the many political subdivisions of the State, resulting in an incomprehensible patchwork of legal authority.

In this case, USDOJ treated *Stokes v. Noonan* and *Riley v. Kennedy* as a change from election to gubernatorial appointment in a Democratic district (Mobile County District 1) at a time when a Republican holds the power of appointment. *See* M.D.A. App. 4a, 5a-6a. Presumably, USDOJ would not have found retrogression had the vacancy arisen in a district populated by White Republicans. Hence, these decisions of the Alabama Supreme Court might apply in such a district, while barred by federal law from application in Mobile County's District 1.

That such a result could obtain is all the more offensive to State sovereignty and federalism principles because *Stokes v. Noonan* and *Riley v. Kennedy* are clearly based on valid, race-neutral, generally applicable principles of law. There is no hint of racial animus in those decisions, and the Alabama Supreme Court has no control over whether the effect of the decisions is retrogressive.

Compliance with the burdensome requirements of Section 5 is difficult enough without the added burden of anticipating every potential constitutional challenge to every

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State was seeking to administer Court-drawn plan when it submitted the plan for preclearance).

State or local law or practice concerning voting. Even when the constitutional challenges are known, the manner in which the issues will be resolved by the Court cannot be known in advance of the Court's decision. Governor Riley's position, that preclearance makes a valid State law enforceable, but does not validate an otherwise invalid State law, offers a less intrusive, less constitutionally-suspect manner of interpreting Section 5.

4. The Kennedy Appellees' workability argument, namely that the Governor "would have this Court hold that [S]tate statutes do not become § 5 benchmarks until they are (1) duly enacted, (2) precleared, (3) subjected to [S]tate court challenge, and (4) upheld by the [S]tate [S]upreme [C]ourt," is a straw man. M.D.A. 25. In fact, Governor Riley would recognize "contingent preclearance," such that enactment and preclearance are sufficient to render a State law enforceable, unless and until the State law is held unconstitutional. At that point, the law would be void, and the preclearance letter would be of no effect. *See* Trial Brief of Governor Riley, Docket No. 16, 3 n.3, 4 (Feb. 3, 2006); Supplemental Brief of Governor Riley, Docket No. 21, 4-5 (Apr. 25, 2006).

The Governor takes this position because, "[i]f that were not the case, the Voting Section of the Civil Rights Division of the United States Department of Justice, not a State's Legislature, would be making [S]tate law." Trial Brief of Governor Riley, Docket No. 16, 4-5 (Feb. 3, 2006). Indeed, in the district court, Governor Riley pointed out that "[r]equiring the State to submit *Stokes v. Noonan*, or *Riley v. Kennedy*, for preclearance begs the question what would happen if USDOJ . . . objected. The State might then be compelled to conduct a special election under a [S]tate law that is unconstitutional and cannot be revived retroactively." Supplemental Brief of Governor Riley, Docket No. 21, 5 (Apr. 25, 2006); *see also* J.S. 12 n.5. Such a result is in tension with the Tenth Amendment, and with general principles of State sovereignty and federalism.

Thus, it is the Kennedy Appellees' construction of Section 5 that raises grave constitutionality and workability concerns. Under their view, any precleared and implemented State law or practice would be invincible to a State law challenge, absent the approval of USDOJ or the District Court for the District of Columbia. It is not difficult to imagine how such a construction would lead the State powerless to protect the integrity of State and federal law.

For example, local election officials in County X decide to enhance minority strength at the polls by henceforth giving minority voters two ballots for all federal, State, and county elections—a One Man-Two Votes rule for minority voters. Should those local election officials submit the change in practice for preclearance, it can hardly be suggested that the change would be retrogressive. *See* 42 U.S.C. § 1973c (reproduced at J.S. App. 14a-15a); M.D.A. App. 5a-6a. Accordingly, preclearance would be appropriate and expected. An election is held, and the One Man-Two Votes rule is implemented.

Thereafter, responsible State officials learn of the precleared, implemented practice and bring suit in State Court to have the practice declared unconstitutional and the local election officials enjoined. The Kennedy Appellees would have the State submit its favorable Court decision for preclearance. Though there can be no doubt that the One Man-Two Votes rule is unconstitutional under State and federal law, there can also be no doubt that returning minority voters in County X to a single vote is retrogressive if the One Man-Two Votes rule is the benchmark.

As compelling as that scenario is, the problems with the Kennedy Appellees' analysis do not end there. If the State officials sued in federal court instead, the favorable decision of the federal court—even this Honorable Court—would seemingly also require preclearance because the Court would have agreed with the State, a covered jurisdiction. *See* 28 C.F.R. § 51.18(a) ("Changes affecting voting that are ordered

by a Federal court are subject to the preclearance requirement of section 5 to the extent that they reflect the policy choices of the submitting authority."). That cannot be what Congress intended. Section 5 must not be interpreted to allow unlawful changes to move the baseline.

As set out in Governor Riley's Jurisdictional Statement, Alabama's general law provides that vacancies on county commissions be filled by gubernatorial appointment. Mobile County's local law, passed in 1985, was an unconstitutional attempt to deviate from that general law. *Stokes v. Noonan.* Moreover, that local law was not revived when Act No. 2004-455 amended the general law to allow for newly enacted local laws. *Riley v. Kennedy.* Hence, when Sam Jones vacated his county commission seat to become Mobile's Mayor in 2005, gubernatorial appointment was the only method of filling that seat authorized by Alabama law. Governor Riley properly exercised his authority to appoint Juan Chastang to the seat.

The preclearance and implementation of an unconstitutional local law ought not have the legal effect of prohibiting Governor Riley's action in returning Mobile County to the rule of law—particularly the law that governed on Alabama's coverage date. But that is exactly what has happened in this case. The result is a patchwork application of two decisions of the Alabama Supreme Court, instead of a uniform State-wide application of the rule of law.

CONCLUSION

This Court should deny the Motion to Dismiss or Affirm, and note probable jurisdiction or, in the alternative, summarily reverse the District Court's judgment.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Governor Riley timely appealed from the district court's May 1, 2007 final judgment entering permanent injunctive relief. The question is whether his decision not to appeal from the district court's August 18, 2006 interlocutory order, which granted declaratory relief but expressly deferred any decision on requested remedies, defeats this Court's jurisdiction.

2. This case arises under §5 of the Voting Rights Act of 1965, which requires certain States to obtain "preclearance"—permission, in effect—from the federal government before implementing "changes" to voting practices or procedures. At issue here are two decisions of the Alabama Supreme Court. In the first of those decisions, *Stokes v. Noonan*, the court invalidated a previously-precleared state statute on race-neutral state constitutional grounds. In the second decision, *Riley v. Kennedy*, the court declined, again on race-neutral state-law grounds, to revive the void statute. The question is whether the Alabama Supreme Court's decisions in *Stokes* and *Riley* were "changes" that required federal-government preclearance before becoming effective.

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OPINIONS BELOW

The three-judge district court's order vacating Governor Riley's appointment of Juan Chastang to fill a vacancy on the Mobile County Commission is reported at *Kennedy v. Riley*, ___ F. Supp. 2d ___, 2007 WL 1284912 (M.D. Ala. May 1, 2007), and reprinted at Jurisdictional Statement Appendix ("J.S. App.") 1a.

The district court's opinion declaring that §5 of the Voting Rights Act of 1965 required preclearance of the two Alabama Supreme Court decisions that led to Chastang's appointment—*Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005)—is reported at *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), and reprinted at J.S. App. 3a. The accompanying judgment is reprinted at J.S. App. 9a.

JURISDICTION

This Court has jurisdiction under 42 U.S.C. §1973c(a), which provides that any action arising under §5 of the Voting Rights Act "shall be heard and determined by a court of three judges ... and any appeal shall lie to the Supreme Court."

As explained below, Governor Riley's appeal was timely. *See* 28 U.S.C. §2101(b). The district court entered final judgment on May 1, 2007. J.A. 6. The Governor noticed his appeal on May 18, 2007, within 60 days of that final judgment. J.A. 7.

STATUTES INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, is reprinted at J.S. App. 14a–16a. Relevant provisions of

Alabama law are reprinted as follows: Act No. 85-237, at J.A. 114; Act No. 2004-455, at J.A. 115–17; Ala. Code §11-3-6, at J.A. 118;[1] and §11-3-6's predecessors, at J.A. 119–27.

INTRODUCTION

This case requires the Court to do something it has done many times before—interpret §5 of the Voting Rights Act. This go-round, however, the interpretive question arises in a context altogether unlike any the Court has ever seen. Here, the district court held that §5 required "preclearance" of two decisions of a state supreme court—the first invalidating a state statute on race-neutral state constitutional grounds; and the second refusing, again on race-neutral state-law grounds, to revive the void statute. The district court's sweeping reading of §5 to reach state courts' exercise of their core judicial "duty" to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), works an unprecedented expansion of that statute's already-broad scope. The district court's novel construction—which exacerbates the significant federalism costs exacted by the preclearance process—finds no support in §5's text or history or in this Court's precedent. It should be rejected.

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[1] Section 11-3-6 was recently recodified (and amended in respects not relevant here) at Ala. Code §11-3-1(b). Because the recodification is not yet in force, we cite to §11-3-6.

STATEMENT OF THE CASE

I. The Statutory Framework

Section 5 of the Voting Rights Act requires certain jurisdictions, including the State of Alabama,[2] to obtain federal-government "preclearance"—permission, in effect—before "enact[ing] or seek[ing] to administer" any voting practice that is "different from that in force or effect on" a statutorily-specified coverage date. 42 U.S.C. §1973c(a). For Alabama and several other States, the coverage date is November 1, 1964. Other jurisdictions' dates are later—either November 1, 1968, or November 1, 1972. In §5 parlance, it is a "change" in voting practices that triggers the obligation to obtain preclearance. The question here is whether two decisions of the Alabama Supreme Court constituted §5 "changes."

A covered jurisdiction may seek either administrative preclearance from the U.S. Department of Justice ("DOJ") or judicial preclearance from the U.S. District Court for the District of Columbia. *Id.* In either event, federal authorities will conduct what is commonly called a "retrogression" analysis to determine whether the proposed change has the purpose or effect "of denying or abridging the right to vote on account of race or color." *Id.* If federal authorities deem the change retrogressive, they will forbid its implementation. If, however, the change is deemed nonretrogressive, it will be precleared for use—subject to the caveat that preclearance will not

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[2] The fully-covered jurisdictions are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas. The partially-covered jurisdictions are California, Florida, New York, North Carolina, South Dakota, Michigan, New Hampshire, and Virginia.

bar a subsequent suit to enjoin the practice on some non-§5 ground. *Id.*

If an individual believes that a covered jurisdiction has enacted or administered an unprecleared change, he or she may sue under §5, in a specially-convened three-judge district court, to enjoin implementation. Review in such "coverage" actions, like this one, is limited to determining (1) whether a §5 change occurred; (2) if so, whether preclearance was obtained; and (3) if not, what remedy should follow. The losing party has a right of direct appeal to this Court.

II. This Case in Historical Context

Alabama's distant history with respect to voting rights is not a proud one. In the years leading up to the passage of the Voting Rights Act of 1965, black registration in Alabama was paltry; by 1964, it still languished below 20%. H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. 2437, 2441. As of 1965, there were very few, if any, elected black officials in Alabama. *See* H.R. Rep. No. 94-196, at 7 (1975). And then there was "Bloody Sunday" in Selma, one of the more shameful episodes in American political history. That confrontation on the Edmund Pettus Bridge was, by most accounts, the event that galvanized the Johnson Administration to "propose a more expansive voting rights bill," which "ultimately became the Voting Rights Act of 1965." S. Issacharoff, P. Karlan & R. Pildes, *The Law of Democracy* 461 (3d ed. 2007).

Happily, the political climate in Alabama today is strikingly different from the one that existed circa 1965. Black Alabamians participate actively in the State's political life. At the time of the 2004 election, 72.9% of the voting-age African-Americans in Alabama were regis-

tered to vote, and 63.9% turned out. S. Rep. No. 109-295, at 11 (2006). On both counts—registration and turnout—black Alabamians significantly outpaced black voters' national averages of 64.4% and 56.3%, respectively. U.S. Census Bureau, Voting and Registration in the Election of November 2004, Table 4a, http://www.census.gov/population/www/socdemo/voting/cps2004.html (visited Jan. 10, 2008). Indeed, as of 2004, black registration rates in Alabama were higher than 28 of the other 31 States for which the Census Bureau compiled statistics, and black turnout rates in Alabama were higher than 24 of those 31 States. *See id.*

The trajectory of black representation in state and local government is also favorable. Today, there are approximately 750 black elected officials in Alabama. S. Rep. No. 109-295, at 12. Indeed, nearly a quarter of the members currently serving in the Alabama Legislature (34 of 140) and nearly a quarter of all county commissioners (83 of 355) are black. Those percentages square almost precisely with the racial makeup of the State as a whole. Accordingly, although it was certainly once true that the number of black elected officials in Alabama "fell far short of being representative of the number of blacks residing" in the State, H.R. Rep. No. 94-196, at 7, black representation today is nearly proportional.

While the statistics tell a compelling story, more important for present purposes is the fact that this case bears no traces of the Jim Crow era. As discussed in detail below, this case had its genesis in the election of Sam Jones, who is black, to be mayor of Mobile, the third-largest city in Alabama. When Jones vacated his county-commission seat to assume his mayoral responsibilities, Governor Riley appointed Juan Chastang, who is also

black, to finish out the term. It was Chastang's appointment that the appellees sued to prevent, DOJ refused to permit, and the district court then vacated.

The circumstances here, therefore, are not even remotely "suggestive" of racial discrimination. *Compare, e.g., Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978). Indeed, all indicators—historical and present—point in precisely the opposite direction.

III. Statement of Facts

A. Alabama Law: 1868 to 1985

For nearly 140 years—since long before the enactment of the Voting Rights Act—the general statutory law in Alabama has provided that vacancies on county commissions "shall be filled by appointment by the Governor." Ala. Code §11-3-6. Section 11-3-6 traces its roots to 1868. Before then, state law vested the vacancy-filling power in the county commission itself. *See* Ala. Code §698 (1852); Ala. Code §826 (1867). On November 25, 1868, only months after ratifying the Fourteenth Amendment, Alabama's Reconstruction Legislature—a body that was dominated by Republicans (126 to the Democrats' 4) and, with 27 black lawmakers, was "the first legislature in Alabama that remotely approached equity in representation"[3]—enacted a law that "authorized and empowered" the Governor "to fill any and all vacancies now existing or which may hereafter exist in the offices of county commissioners." Act No. 12, §1. That statute was codified in the 1876 Alabama Code, *see* Ala. Code §740 (1876), and then carried forward, essen-

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[3] W. Rogers, *et al.*, *Alabama: The History of a Deep South State* 249–50 (1994).

tially verbatim and without interruption, in every subsequent codification. *See* Ala. Code §820 (1886); Ala. Code §952 (1896); Ala. Code §3307 (1907); Ala. Code §6749 (1923); Ala. Code Tit. 12, §6 (1940); Ala. Code §11-3-6 (1975).[4]

B. Act No. 85-237 and *Stokes v. Noonan*

In 1985, the Alabama Legislature enacted a "local law," applicable to Mobile County only, which provided that certain vacancies on the Mobile County Commission should be filled through special election. *See* Act No. 85-237 (J.A. 114). DOJ precleared Act No. 85-237, as compliant with §5 of the Voting Rights Act, in June 1985. J.A. 20.

When in the spring of 1987 a vacancy arose on the Mobile County Commission, litigation immediately ensued concerning Act No. 85-237's constitutionality under state law. Claiming that county officials were planning to hold a special election to fill the vacancy, Mobile voter Willie Stokes sued in state court to prevent the election from going forward. Stokes contended, as relevant here, that the 1985 act was inconsistent with Alabama Code §11-3-6 (providing for "appointment by the Governor") and, accordingly, violated §105 of the Alabama Constitution, which states that no "local law ... shall be enacted in any case which is provided for by a general law." Ala. Const. Art. IV, §105. The state trial court rejected Stokes' argument and declined to enjoin the special election.

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[4] These statutes are reproduced at J.A. 118–27.

The next day, Stokes appealed to the Alabama Supreme Court. Stokes' request for a stay pending appeal was denied, however, and the election went forward. Sam Jones won, and took office in July 1987. J.A. 27. But on appeal of the trial court's order, the Alabama Supreme Court reversed. It held that the 1985 act "clearly offend[ed]" and was "directly counter" to "the language" of §105. *Stokes v. Noonan*, J.S. App. 18a–19a. The supreme court's decision thus reaffirmed that the authority to fill commission vacancies resided where it had since 1868—with the Governor. The decision, which in essence held that no election should have occurred, left Sam Jones vulnerable to an action to remove him from office. Governor Guy Hunt eliminated that risk by exercising his authority under §11-3-6 to appoint Jones to the post. J.A. 27.

C. Act No. 2004-455 and *Riley v. Kennedy*

Sixteen years later, in 2004, the Alabama Legislature amended the general law, §11-3-6, to add a proviso, such that county commission vacancies "shall be filled" by gubernatorial appointment "[u]nless a local law authorizes a special election." Act No. 2004-455 (J.A. 116). DOJ precleared Act No. 2004-455 in September 2004. J.A. 21. The next year, the same Sam Jones (still sitting as a commissioner) was elected mayor of Mobile. *Id.* In anticipation of the coming vacancy, Yvonne Kennedy, James Buskey, and William Clark sued in state court, arguing that Act No. 2004-455 had revived the unconstitutional 1985 act, thus requiring a special election to fill the vacancy. *Id.*

Although the state trial court granted the requested relief, the Alabama Supreme Court unanimously re-

versed. It rejected any suggestion that Act No. 2004-455 should be applied retroactively to "give effect to" the 1985 act and held, instead, that "the plain language in Act No. 2004-455 ... provides for prospective application only." *Riley v. Kennedy*, J.S. App. 29a–30a. Act No. 2004-455, in other words, paved the way for new local laws, but it did not resurrect dead ones. "[C]onsequently," the court concluded, "Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment" under the longstanding mandate of §11-3-6. J.S. App. 31a. Governor Riley appointed Juan Chastang to the seat.[5]

IV. Procedural History

The day after the Alabama Supreme Court denied rehearing, Kennedy, Buskey, and Clark (hereinafter the "appellees") filed this action in federal district court. The basis of their claim, premised on §5 of the Voting Rights Act, was that "the State of Alabama was required, but failed, to preclear two decisions of the Alabama Supreme Court: *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005)." J.S. App. 3a. The appellees sought a "declaratory judgment" that §5 required preclearance of *Stokes* and *Riley* and, in addition, requested several specific "injunctions," as follows—

- preventing Governor Riley from swearing anyone in to the commission post;

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[5] In 2006, the Alabama Legislature adopted Act No. 2006-342, which provides that on a going-forward basis, vacancies on the Mobile County Commission will be filled through special election. Motion To Dismiss or Affirm ("M.D.A.") App. 1a.

- prohibiting enforcement "of the *Stokes* and *Riley* decisions until they are precleared"; and

- ordering state officials to obtain preclearance within 90 days.

J.A. 11; Doc. 15, pp.7–8; Doc. 20, p.3.

A. The August 18, 2006 Order

On August 18, 2006, the three-judge district court issued the first of two key orders in the case. The court explained that "[i]n reviewing the plaintiffs' §5 claim, we are tasked with the limited purpose of determining '(i) whether a change was covered by §5, (ii) if the change was covered, whether §5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate.'" J.S. App. 6a (quoting *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983)). Because neither *Stokes* nor *Riley* had been precleared, the court said, the "critical inquiries" were "whether these decisions brought about a change covered by §5, and, if so, the appropriate remedy." *Id.* In its August 2006 order, the district court answered the first of those "critical inquiries," but not the second.

The district court's analysis of the coverage question—*i.e.*, whether *Stokes* and *Riley* were §5 "changes" requiring preclearance—is spare. Having initially determined that "a §5 change may be brought about by state court decisions," the court observed that §5 "changes" are "measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." J.S. App. 6a–7a. The court held that "[b]ecause Act No. 85-237 was the most recent pre-

cleared practice put into force and effect with the election of [Sam] Jones in 1987, it is the baseline against which we must determine if there was a change." *Id.* at 7a. The district court acknowledged that "the Alabama Supreme Court declared Act No. 85-237 unconstitutional under state law" in *Stokes*, but deemed it significant that *Stokes* was decided "after Act No. 85-237 had been put into effect." *Id.* In any event, the court said, it was "required to determine the baseline 'without regard for [its] legality under state law.'" *Id.* (quoting *Lockhart*, 460 U.S. at 133). The district court thus concluded that because the 1985 act was the baseline and because *Stokes* "invalidat[ed] it" and *Riley* later "refus[ed] to revive" it, "the two decisions constituted changes that should have been precleared before they were implemented." *Id.* at 5a, 7a–8a.

Having resolved the §5 coverage issue, the district court expressly refused (at the appellees' own "suggest[ion]") to address the issue of remedy. *Id.* at 8a. In particular, the court did not "enjoin enforcement of *Stokes v. Noonan* and *Riley v. Kennedy*, or otherwise even consider taking any action regarding the appointment of Juan Chastang to the Mobile County Commission." *Id.* Instead, the court allowed the State 90 days to seek preclearance, and requested Governor Riley "to keep the court informed of what action, if any, the State decides to take" concerning preclearance "and the result of that action." *Id.* at 9a–10a. If the State did not obtain preclearance, the court said, it would "revisit the issue of remedy." *Id.* at 9a. The court then purported to make its order "final" pursuant to Federal Rule of Civil Procedure 58. *Id.* at 10a.

B. Preclearance Proceedings

The State sought administrative preclearance of *Stokes* and *Riley* (J.A. 30–42), but DOJ objected. In refusing preclearance, DOJ treated Act No. 85-237 as the relevant baseline; notwithstanding *Stokes* and *Riley*, DOJ concluded that the 1985 act "remains in full force and effect, as it affects voting, was precleared, and was implemented in the 1987 special election cycle." Motion To Dismiss or Affirm ("M.D.A.") App. 5a. DOJ later denied (*id.* at 9a–19a) the State's request for reconsideration (J.A. 58–113).[6]

C. The May 1, 2007 Order

Following DOJ's refusal to preclear *Stokes* and *Riley*, the appellees reiterated their requests for injunctive relief. On May 1, 2007, the district court entered a remedy order, thereby addressing the second of the two "critical inquiries" it had flagged in its earlier opinion. J.S. App. 6a. The court held that because *Stokes* and *Riley* "were not precleared, Governor Bob Riley's appointment of Juan Chastang to the Mobile County Commission pursuant to these two decisions was unlawful under federal law." *Id.* at 1a–2a. Accordingly, the court vacated Chastang's appointment. *Id.* at 2a.

D. The Appeal

On May 18, 2007, Governor Riley noticed his appeal to this Court "from the final Order of the three-judge court vacating his appointment of Juan Chastang to fill a vacancy in the Mobile County Commission, entered in this action on May 1, 2007, and from prior orders, judg-

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[6] The State has not, at this time, sought judicial preclearance.

ments and decrees of the three-judge court upon which the May 1, 2007 Order necessarily relies, specifically including the Judgment entered on August 18, 2006 and the Opinion of the same date." J.S. App. 11a (citations omitted).

On November 20, 2007, this Court entered an order postponing consideration of jurisdiction "to the hearing of the case on the merits."

SUMMARY OF ARGUMENT

I. This Court has jurisdiction over Governor Riley's appeal from the district court's May 2007 final judgment.

A. The appellees' contention that the district court's August 2006 coverage order was a final judgment that required an immediate appeal is meritless. That order declared that *Stokes* and *Riley* required §5 preclearance, but it declined to enjoin enforcement of those decisions pending preclearance or to enter any other remedy. The district court didn't address the remedy issue until May 2007, when it vacated Juan Chastang's appointment. The fact that the district court labeled its August 2006 order "final" is jurisdictionally irrelevant.

B. Even if Governor Riley was entitled to appeal from the August 2006 order, he was not obliged to do so. A party who has a right to an interlocutory appeal may wait and appeal from the final judgment, and that appeal will bring with it all interlocutory orders on which the final judgment is based.

C. The policy implications of the appellees' jurisdictional position—which would require immediate

appeal of every §5 coverage decision—are perverse. Considerations of judicial economy favor a rule that encourages States, upon a finding of §5 coverage, to seek preclearance, not mandatory review in this Court.

II. The Alabama Supreme Court's decisions in *Stokes*, which invalidated Act No. 85-237 on state constitutional grounds, and *Riley*, which declined (again on state-law grounds) to revive it, were not "changes" that required preclearance under §5.

A. The federalism implications of the district court's interpretation—which strips state courts of their autonomy to decide state-law questions by subjecting their decisions to the veto of federal executive-branch officials—are profound. To avoid exacerbating the federalism costs that preclearance imposes, this Court should require some clear indication that the district court's interpretation is correct. There is no such indication.

1. Section 5's text belies the district court's interpretation. By its terms, §5 requires preclearance of any voting practice "different from that in force or effect on November 1, 1964." The practice resulting from *Stokes* and *Riley*—gubernatorial appointment—*was* the practice "in force or effect on November 1, 1964." Moreover, §5 clearly provides that preclearance does not shield a practice from invalidation on other, non-§5 grounds—which is exactly what happened here, when the Alabama Supreme Court nullified and later declined to revive Act No. 85-237's provision for special elections.

2. Evidence of Congress' intent likewise refutes the district court's interpretation. Section 5's purpose was to preclude States from playing a "cat-and-

mouse" game with federal authorities—*i.e.*, maneuvering to avoid federal-court decrees enjoining discriminatory voting practices by quickly switching to others. That is not the sort of thing the Alabama Supreme Court did—or was even capable of doing—in *Stokes* and *Riley*. Furthermore, §5's legislative history confirms that Congress was concerned not with state courts' case-bound exercises of judicial review, but rather with States' efforts to alter voting practices by statute or administrative acts.

3. This Court's precedents do not support the district court's decision. The district court's interpretation is contrary to *Abrams v. Johnson*, which held that §5 "cannot be used to freeze in place" an "unconstitutional" practice. 521 U.S. 74, 97 (1997). And the cases on which the district court principally relied—*Perkins v. Matthews*, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983)—are distinguishable in two critical respects. First, neither involved a state supreme court's authoritative determination of state law. Accordingly, neither justifies an interpretation of §5 that would subject state-court judgments to DOJ superintendence. Second, both turned on whether a state practice was actually "in ... effect" on §5's statutory coverage date—*e.g.*, November 1, 1964. Neither spoke to the question, presented here, whether a state law enacted and precleared *after* 1964 is entitled to §5 "baseline" status even when the state supreme court has authoritatively determined that it is invalid under state law.

B. The clear-statement and constitutional-avoidance doctrines contradict the district court's interpretation, which substantially exacerbates §5's federalism costs in three ways. First, the district court's reading subjects state courts' determinations of state law to

review—and revision—by federal executive-branch officials. Second, because it would require States to "keep in place ... practice[s] held invalid under state law" (M.D.A. 23), the district court's interpretation implicates the anti-commandeering principle. Third, because the record is devoid of any evidence that Congress thought state-court decisions like *Stokes* and *Riley* pose a serious threat to voting rights, reading §5 to cover those decisions could render §5, as applied, insufficiently "congruent and proportional" under *City of Boerne v. Flores*, 521 U.S. 507 (1997).

C. Pragmatic considerations counsel against extending §5 to judicial decisions like *Stokes* and *Riley*. The district court's interpretation would open up a Pandora's box of potential challenges to well-settled state-court precedents. And in light of other remedies available to address voting-rights violations, there is simply no need to stretch §5 as the district court did.

III. There is an additional basis for reversal here. Under *Young v. Fordice*, 520 U.S. 273 (1997), a State's temporary misapplication of state law, even if precleared and actively administered, is deemed never to have been "in force or effect" and, accordingly, does not become part of the §5 baseline. Because the first and only attempt to administer Act. No. 85-237—the 1987 election—occurred under a cloud of litigation from which it never emerged, the 1985 act was never "in force or effect," and gubernatorial appointment remained the applicable baseline. Accordingly, under *Young*, the *Stokes* and *Riley* decisions did not mark "changes" requiring §5 preclearance.

ARGUMENT

I. This Court Has Jurisdiction Under 42 U.S.C. §1973c(a).

The jurisdictional issue here is straightforward, and the answer is clear. Section 5 coverage actions are heard and decided by three-judge district courts, and "any appeal shall lie to the Supreme Court." 42 U.S.C. §1973c(a). Under §1973c(a), this Court has jurisdiction over this appeal from the district court's final judgment. The district court's August 18, 2006 order expressly withheld any ruling on the injunctive relief the appellees had requested. J.S. App. 8a. It wasn't until May 1, 2007, after preclearance was denied and the appellees renewed their remedial requests, that the court addressed the remedy issue and vacated Juan Chastang's appointment. *Id.* at 1a–2a. Governor Riley timely appealed from that final judgment and, in so doing, expressly appealed from all underlying orders, including, specifically, the August 18, 2006 order. *See supra* at 12–13. The appellees' contention that Governor Riley was required to take an earlier appeal is baseless.

A. Governor Riley Was Not Required To Appeal From the District Court's Non-Final August 2006 Order.

The appellees do not deny that §1973c(a) gives this Court jurisdiction over appeals from final judgments. Nor do they deny that an appeal from a final judgment properly brings with it all interlocutory decisions made by the district court during the litigation. *See, e.g., Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); 15A C. Wright, A. Miller, *et al.*,

Federal Practice and Procedure §3905.1, at 250 (2d ed. 1992).

Instead, the appellees stake their jurisdictional argument entirely on the proposition that the district court's initial August 2006 declaration of §5 coverage—*i.e.*, that *Stokes* and *Riley* "constituted changes that should have been precleared before they were implemented" (J.S. App. 7a–8a)—was *itself* a final judgment that triggered an obligation to appeal immediately. *See* M.D.A. 11–16. In particular, the appellees assert that the August 2006 order was final because in it the district court "[1] conclusively resolved the merits of the appellees' complaint, [2] ordered the Governor to obtain preclearance, and [3] directed that its order be entered as the final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure." M.D.A. 11. The appellees are wrong on every count.

1. The cornerstone of the appellees' position is their contention that the district court's August 2006 order "made clear that it was 'end[ing] the litigation on the merits.'" M.D.A. 12 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). This argument—based on a truncation of a familiar quotation—reveals a fundamental flaw in the appellees' jurisdictional theory. The fact that the district court decided the §5 coverage *issue* does not mean that the court finally decided the *case*. Instead, an appealable final judgment—as the full quote from *Catlin* makes plain—is "one which ends the litigation on the merits *and leaves nothing for the court to do but execute the judgment*." 324 U.S. at 233 (emphasis added). That description does not describe the August 2006 order, which expressly left the remedy question unresolved. Because the order did not "dispos[e] of the whole case"

and "adjudicat[e] all rights," it was not an appealable final judgment. *Id.*

The non-finality of the August 2006 order is clear in light of how §5 coverage actions work. The district court's inquiry focuses on three questions: "(i) whether a change was covered by §5, (ii) if the change was covered, whether §5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy is appropriate." *Lockhart*, 460 U.S. at 129 n.3. Because all here agree that neither *Stokes* nor *Riley* was precleared, the district court rightly recognized that the "critical inquiries" were "whether these decisions brought about a change covered by §5, *and, if so, the appropriate remedy*." J.S. App. 6a (emphasis added). The August 2006 order answered yes to the first of those "critical inquiries"—thereby granting the appellees the declaration they sought—but expressly declined to answer the second. Instead, at the appellees' "suggest[ion]," the district court deferred a decision on whether to "enjoin enforcement" of *Stokes* and *Riley* or to "even consider taking any action regarding the appointment of Juan Chastang to the Mobile County Commission." J.S. App. 8a. It was not until the May 2007 judgment that the district court completed its *Lockhart* function by addressing the second of the two "critical inquiries" and entering a remedy order.

The August 2006 order, therefore, was a simple declaration that left the remedy issue open. Had the appellees "sought *only* a declaratory judgment, and no other form of relief," the finality calculus might be different. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976). Like the plaintiffs in *Wetzel*, however, the appellees here "requested an injunction, but did not get one." *Id.* Be-

cause the August 2006 order "left unresolved [the appellees'] requests for an injunction" and "disposed of none of [their] prayers for relief," it was not final. *Id.*; *cf. Lucas v. Bolivar County*, 756 F.2d 1230, 1234–35 (5th Cir. 1985) (district-court order was not final where "the court retained jurisdiction, directed that the [redistricting] plan be submitted for preclearance, and neither denied [n]or granted the relief requested").

2. The appellees' jurisdictional argument likewise rests on the mistaken view that the district court "ordered the Governor to obtain preclearance." M.D.A. 11, 13. That is not true. Rather, the court merely "g[a]ve the State 90 days to obtain the necessary preclearance" (J.S. App. 8a) and, in so doing, requested the Governor "to keep [it] informed of what action, *if any*, the State decides to take and the result of that action" (J.S. App. 9a–10a) (emphasis added). The district court thus gave the State an opportunity—not a command—to seek preclearance.

The absence of any injunction in the August 2006 order (or accompanying judgment) suffices to distinguish this case from those upon which the appellees rely. In each of those cases, the district court had enjoined the supposed "changes" pending preclearance. *See City of Monroe v. United States*, 522 U.S. 34 (1997) (per curiam), *rev'g United States v. City of Monroe*, 962 F. Supp. 1501, 1519–20 (M.D. Ga. 1997); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 36 (1978); *Georgia v. United States*, 411 U.S. 526, 528 (1973). In any event, this Court has held that "*sub silentio*" exercises of jurisdiction do not give rise to binding jurisdictional precedent. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (19[illegible]9). Absent an order enjoining the implemen-

tation of *Stokes* and *Riley* pending §5 preclearance, Governor Riley was justified in awaiting final resolution of the proceedings before appealing.

3. Finally, the appellees emphasize that the district court "directed that its [August 2006] order be entered as the final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure." M.D.A. 11. But it is hornbook law that merely calling a judgment "final" does not make it so, and the fact that the district court directed entry of its coverage decision under Rule 58 is "jurisdictionally irrelevant." 19 *Moore's Federal Practice* §202.04[2] (3d ed. 2007); *accord, e.g.*, *Wetzel*, 424 U.S. at 741–43; *Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354, 358 (4th Cir. 2005); *Franklin v. District of Columbia*, 163 F.3d 625, 628–30 (D.C. Cir. 1998).

B. Governor Riley Has Not Waived His Right To Appeal the August 2006 Order.

Even assuming that Governor Riley *could* have taken an earlier appeal, he was not *obliged* to do so, and his decision to await final judgment did not waive his right to appeal the coverage decision. Even where an interlocutory appeal is available "as a matter of right, failure to take an available appeal does not of itself waive the right to secure review, on appeal from final judgment, of matters that could have been appealed but were not." 16 Wright & Miller, *supra*, §3921, at 19; *accord Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 74 (1996); 19 *Moore's*, *supra*, §203.10[7][a]. The Governor, therefore, did not waive his objections to the coverage decision by waiting to appeal until after the district court had entered a remedial order.

C. The Appellees' Position Makes for Bad Jurisdictional Policy.

The appellees' position—which would require immediate appeal of every §5 coverage determination, even absent an order enjoining the supposed "changes"—is not only contrary to settled law but also makes no practical sense. Systemic considerations favor a rule that encourages covered jurisdictions, upon a finding of §5 coverage, to seek preclearance, not immediate review in this Court. First, notwithstanding the substantial burdens that preclearance imposes on covered jurisdictions, it is, relative to full-blown appellate review, a streamlined process. *See* 28 C.F.R. §51.42 (presumptive 60-day timeframe for DOJ to interpose an objection). Second, DOJ preclears submitted changes 99% of the time, *see* S. Rep. No. 109-295, at 13–14 (2006), thus mooting the need for direct appeal in many cases. Accordingly, whereas Governor Riley's view is "consonant with the overriding policy" of minimizing this Court's mandatory docket, *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974), the appellees' position frustrates that policy.

The Court should take jurisdiction and decide the important question presented.

II. The Alabama Supreme Court's Decisions in *Stokes v. Noonan* and *Riley v. Kennedy* Were Not "Changes" That Required Preclearance Under Section 5 of the Voting Rights Act.

By all accounts, §5's preclearance requirement is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies." *United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978)

(Stevens, J., dissenting). Because it works a "substantial departure ... from ordinary concepts of our federal system," and because "its encroachment on state sovereignty is significant and undeniable," §5 must "be read and interpreted with care." *Id.* (internal quotation marks omitted). Accordingly, in answering the interpretive question here, this Court should, as it has done before, avoid reading §5 so as to "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's constitutionality." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*") (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999)).

The federalism implications of the district court's construction—which, in effect, strips state courts of their authority to decide pure state-law questions—are profound. Surely the average American lawyer would be surprised to learn that a state supreme court's decision invalidating a state statute might be subject to the veto of a federal executive official. The image of "non-lawyer section 5 analysts"[7] reviewing state supreme courts' authoritative determinations of state law is jarring—a federalism-and-separation-of-powers double-whammy. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.* (1792); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting) (objecting to an interpretation of a federal statute under which "state courts would be subject to being overturned, not just by any agency, but by an agency established by a different sovereign"). But that, to be clear, is exactly what happened here: The Alabama Supreme Court expressly held

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[7] Issacharoff, Karlan & Pildes, *supra*, at 521.

that Act No. 85-237 was unconstitutional, and thus a nullity, on state-law grounds, and later expressly declined, again on state-law grounds, to resurrect it. DOJ then refused to bless the Alabama Supreme Court's decisions and asserted, instead, that the 1985 act "remains in full force and effect." M.D.A. App. 5a, 12a. The district court's interpretation of §5 as authorizing that sort of intrusion substantially "alter[s] the usual constitutional balance between the States and the Federal Government." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) (internal quotation marks omitted).

As Justice Kennedy said only recently, "[i]f, by some course of reasoning, state courts must live with the insult that their judgments can be revised by a federal agency, the Court should at least insist upon a clear instruction from Congress." *Alaska*, 540 U.S. at 513 (dissenting opinion). Here, there is no such instruction. All relevant sources—§5's language, its purpose and legislative history, and this Court's §5 jurisprudence—refute the district court's novel interpretation.

A. No Indicator of Statutory Meaning Supports the District Court's Interpretation of Section 5 To Require Preclearance of *Stokes* and *Riley*.

In *Stokes v. Noonan*, the Alabama Supreme Court held that Act No. 85-237 "clearly offend[ed]" and was "directly counter" to "the language of [the Alabama] constitution" (J.S. App. 18a–19a), which provides in §105 that no "local law ... shall be enacted in any case which is provided for by a general law." Ala. Const. Art. IV, §105. Accordingly, the court discharged its "duty" to "declare Act No. 85-237 unconstitutional as violating §105." J.S.

App. 21a. The effect of that "declar[ation]" under Alabama law is clear: The 1985 act was void *ab initio*—"'in legal contemplation, as inoperative as though it had never been passed.'" *Ex parte Southern Ry.*, 556 So. 2d 1082, 1090 (Ala. 1989) (quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)). Seventeen years later, in *Riley v. Kennedy*, the Alabama Supreme Court read "the plain language" of Act No. 2004-455 to apply prospectively only (J.S. App. 30a) and, accordingly, rejected any contention that Act No. 2004-455 revived Act No. 85-237. The question now, as the district court recognized, is whether by "invalidating" the 1985 act in *Stokes* or "refusing to revive" it in *Riley*, the Alabama Supreme Court "changed" state law within the meaning of §5 practice. J.S. App. 5a. It did not.

One prefatory point: Although the district court interpreted §5 as requiring preclearance of both *Stokes* and *Riley*, its determination that "change" had occurred was more about *Stokes* than *Riley*. In striking down Act No. 85-237, *Stokes* held that gubernatorial appointment was the appropriate means under Alabama law of filling vacancies on the Mobile County Commission; *Riley* merely maintained that status quo. Accordingly, if § 5 didn't require preclearance of *Stokes*, then it didn't require preclearance of *Riley*, either.

The district court's conclusion that §5 required preclearance of *Stokes* (and, derivatively, *Riley*) rests on a remarkable premise. In the district court's view, the issuance of a preclearance letter finding a state statute nonretrogressive, and thus compliant with §5, effectively strips state courts of their jurisdiction to consider independent challenges to that statute under state law. Even where, as here, the precleared statute is clearly uncon-

stitutional (the district court didn't question the correctness of either *Stokes* or *Riley*, *see* J.S. App. 8a), it is frozen in place as a §5 "baseline." The state courts have no authority—at least absent further federal permission, which here was refused—to remedy the constitutional defect, and the State, as the appellees have acknowledged, "must keep in place a practice held invalid under state law." M.D.A. 23. That cannot possibly be the law. Fortunately, as we will explain, it isn't.

1. There is no basis in Section 5's text for requiring preclearance of Stokes *and* Riley.

The district court did not purport to find any support for its decision in §5's text. And for good reason—there is none to be found. All relevant textual indications contradict the district court's interpretation.

a. Taken at face value, §5's text clearly does not require preclearance of *Stokes* and *Riley*. Section 5 requires Alabama to obtain preclearance of any voting practice "different from that in force or effect *on November 1, 1964*." 42 U.S.C. §1973c(a) (emphasis added). Neither *Stokes* nor *Riley* called for a practice "different from that in force or effect on November 1, 1964." On that date—and, for that matter, for nearly a century leading up to it—Alabama law clearly provided that vacancies on county commissions would be filled by gubernatorial appointment. In *Stokes*, the Alabama Supreme Court held that despite Act No. 85-237 Alabama law remained just as it had been "on November 1, 1964," and that vacancies on the Mobile County Commission should be filled by the Governor. In *Riley*, the court reaffirmed gubernatorial appointment as the appropriate practice.

Section 5's text thus provides no support for the district court's decision.

The point here is not to quarrel with dicta in *Presley v. Etowah County Commission*, 502 U.S. 491, 495 (1992), and *Young v. Fordice*, 520 U.S. 273, 281–82 (1997), suggesting that once a change is precleared it "normally need not be cleared again" but, rather, "become[s] part of the baseline standard." *Id.* at 281. The Court needn't tackle today the thorny question whether §5's language would preclude a state *legislature's* unprecleared return to a November 1, 1964 practice.[8] The point is simply that because this case arises so far outside the ordinary course of §5 business—a state supreme court's exercise of judicial review having been subjected to DOJ superintendence—one would expect some clear textual warrant for the district court's interpretation. *See, e.g.*, *Raygor*, 534 U.S. at 543–44. Here, no such warrant even arguably exists.

b. Section 5's text also demonstrates that preclearance is *not* conclusive of a post-1964 statute's enforceability. Indeed, §5 expressly contemplates that a precleared statute remains subject to a post-preclearance challenge on non-§5 grounds—like the one the Alabama Supreme Court sustained in *Stokes*. It would be odd indeed if, as the district court held, the very possibility that §5 envisions—a court decision invalidating a precleared statute on some non-§5 ground—was itself a "change" that required a fresh approval.

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[8] DOJ's §5 regulations purport to require preclearance of changes that "return[] to a prior practice or procedure." 28 C.F.R. §51.12. However, "[t]he issue of the status of changes resulting from orders of State courts is not addressed in" those regulations. 46 Fed. Reg. 870, 872 (Jan. 5, 1981).

Section 5's language is clear on this point: It expressly states that neither administrative nor judicial preclearance "shall bar a subsequent action to enjoin enforcement of [a precleared] qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. §1973c(a). This Court has emphasized that this phrase means just what it says—that a state statute or practice "*that satisfies §5* still may be enjoined as unconstitutional." *Bossier Parish II*, 528 U.S. at 339 (internal quotation marks omitted); *see also id.* at 335 (preclearance "does *not* represent approval of the voting change" for all purposes but, rather, "affirms nothing but the absence of" retrogression under §5). Section 5's language is unqualified; a precleared practice remains subject to "a subsequent action to enjoin enforcement." There is no principled basis for engrafting onto that pellucid savings clause a proviso excluding state-law challenges. *See United States v. Rutherford*, 442 U.S. 544, 559 (1979) ("Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.").

DOJ regulations confirm what §5 itself indicates: "The preclearance by the Attorney General of a voting change does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of Section 5 ...." 28 C.F.R. §51.49. There is no warrant for reading that provision—particularly given its use of the universal modifier "any"—implicitly to exclude challenges based on state constitutional provisions, which, no less than federal constitutional provisions (and other sections of the Voting Rights Act), are "requirement[s] of the law."[9]

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[9] The phrase "any other requirement of the law" cannot be read to mean "any other requirement of" the Voting Rights Act. "Act" is a

Finally, to the extent that the unqualified statutory and regulatory language leaves any room for doubt, DOJ practice confirms that precleared state statutes remain subject to subsequent state-law challenges. For starters, when it preclears a change, DOJ uniformly adds a clause disclaiming any intent to pretermit later suits. For example, when DOJ precleared Act No. 85-237, it warned as follows: "[W]e feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar *any subsequent judicial action* to enjoin the enforcement" of a precleared statute. Doc. 14, Exh. C (emphasis added). More pointedly, DOJ's website explicitly says that precleared statutes remain subject to *state*-law challenges:

> A determination by the Attorney General not to object removes the prohibition on enforcement imposed by Section 5. ... Although the jurisdiction may then implement that change, *the change remains subject to a challenge on any other grounds.* For example, a redistricting plan may still be challenged in court by the Attorney General as violating Section 2 of the Voting Rights Act, or any other applicable provision of federal law which the Attorney General is authorized to enforce. *Similarly, private individuals with standing may challenge that practice under any*

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defined term in the regulations, 28 C.F.R. §51.2 ("Act means the Voting Rights Act of 1965 ...."), and where the regulations mean to refer to the "Act," they do so expressly.

> *applicable provision of state or federal law.*

U.S. Department of Justice: Civil Rights Division, Voting Section, Introduction to Section 5, http://www.usdoj.gov/crt/voting/sec_5/about.htm (visited January 10, 2008) (emphasis added).

All these sources confirm the commonsense proposition that in covered jurisdictions like Alabama, the enforceability of any post-1964 voting practice rests on twin pillars: (1) preclearance and (2) validity under state law. Preclearance, in other words, is a *necessary* condition to enforceability, but not a *sufficient* condition. *See Morris v. Gressette*, 432 U.S. 491, 501–02 (1977) ("Section 5 requires covered jurisdictions to delay implementation of *validly enacted state legislation* until federal authorities have had an opportunity to" review and preclear it. (emphasis added)); H.R. Rep. No. 94-196, at 58 ("*[I]n addition to whatever steps are made necessary by State or local law for a proposed change to become law*, section 5 requires federal approval." (emphasis added)). By making Act No. 85-237's enforceability contingent only on preclearance—and disregarding its authoritatively-adjudicated invalidity under state law—the district court wrongly ignored the second pillar.

c. The Voting Rights Act's structure likewise indicates that preclearance was not required here. The Act's "bailout" provision states that to become eligible for exemption from coverage a jurisdiction must have, among other things, "*repealed* all [unprecleared] changes covered by" §5. 42 U.S.C. §1973b(a)(1)(D) (emphasis added). As a matter of common parlance, "repeal" is a means of undoing a statute or an administra-

tive rule, not a court decision. The district court's view that state courts' interpretations of state constitutions constitute §5 "changes"—which must somehow be "repealed" before a State can bail out—creates tension, if not outright contradiction, within the Voting Rights Act.

2. *There is no basis in Section 5's purpose or legislative history for requiring preclearance of* Stokes *and* Riley.

The district court likewise claimed no historical support for its interpretation of §5 as requiring preclearance of *Stokes* and *Riley*. And, again, with good reason—there is none. The district court's reading does not mesh with the concerns that gave rise to §5, and, in fact, it is contradicted by key portions of the Voting Rights Act's legislative history.

a. This Court has repeatedly observed that any determination of §5's proper scope must account for "the historical experience which it reflects." *McCain v. Lybrand*, 465 U.S. 236, 246 (1984). That well-documented "historical experience" reveals that the concerns that gave rise to §5 had nothing to do with state-court decisions like *Stokes* and *Riley*. Congress was worried, instead, about state legislative and executive officials, who had shown a propensity to evade federal-court decrees by cleverly manipulating voting practices.

In the years leading up to 1965, Congress "repeatedly tried to cope with the problem [of voting discrimination] by facilitating case-by-case litigation" against discriminatory practices. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). That approach proved ineffective, however, in large part because affected States and localities "merely switched to discriminatory devices not

covered by the federal decrees or ... enacted difficult new tests designed to prolong the existing disparity between" white and black voters. *Id.* at 314. Knowing that a number of States "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," and "suppos[ing] that these States might try similar maneuvers in the future," Congress enacted §5. *Id.* at 335. Section 5 was Congress' targeted "'response to [the] common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.'" *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 94-196, at 57–58 (1975)). Section 5, in short, was addressed to covered jurisdictions' "agility"; by enacting §5, "Congress meant to guard against just those discriminatory devices that were as yet untried" because it "did not know what the covered jurisdictions would think up next." *Bossier Parish II*, 528 U.S. at 361, 367 n.14 (Souter, J., dissenting).

Against this backdrop, application of §5's preclearance regime to legislative and executive action fits hand-in-glove. State legislators, registrars, and precinct officials are capable of the sort of "cat and mouse" game that Congress feared. 111 Cong. Rec. 10,727 (1965) (Sen. Tydings). But §5's fit with respect to state-court judicial decisions like *Stokes* and *Riley*—which arose from discrete cases and controversies—is more square peg, round hole. In striking down Act No. 85-237 on state constitutional grounds, and later declining (again on state-law grounds) to revive it, the Alabama Supreme Court demonstrated none of the "agility" with which Congress was concerned. Nor can those ordinary exer-

cises of judicial review be described as Alabama's effort to "think up" anything—let alone anything sinister. The court was simply deciding the cases brought before it. Section 5's core purpose of preventing States from "staying one step ahead" of federal authorities has no application here.

b. Section 5's extensive legislative history confirms that Congress did not have state-court decisions like *Stokes* and *Riley* in mind when it constructed the preclearance regime. The House Report accompanying the 1965 Act, in fact, plainly states that §5 "deals with attempts by a [covered] State or political subdivision ... to alter *by statute or administrative acts* voting qualifications and procedures in effect on November 1, 1964." H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. 2437, 2457–58 (emphasis added). The Senate Report says the same thing, verbatim. S. Rep. No. 89-162, 1965 U.S.C.C.A.N. 2508, 2562 (joint views of 12 committee members).

Section 5's drafting history provides insight into why the committee reports explain the statute's scope the way they do. As originally proposed, §5 (then §8 of S. 1564) addressed only formal legislative acts: It required preclearance "[w]henever a [covered] State or political subdivision ... shall *enact any law or ordinance* imposing qualifications or procedures for voting different from those in force and effect on November 1, 1964." 111 Cong. Rec. 28,358 (1965) (emphasis added). In committee, however, the language was revised to include the current "enact or seek to administer" formulation, *id.* at 28,359–60, thereby, as the committee reports attest, reaching attempts to change voting practices "by statute or administrative acts." Conspicuously missing is any

language that would have extended §5's scope to cover court decisions like *Stokes* and *Riley*.

The legislative history accompanying §5's post-1965 reauthorizations is to the same effect: §5 was invariably described as applying to legislative and administrative action. The 1970 House Report, for instance, emphasized the "continuing importance of requiring the submission of new voting laws or regulations" for review under §5; such review, the report stated, would ensure that covered jurisdictions "cannot, by employing changes in legislation, undo or defeat the rights recently won by nonwhite voters." H.R. Rep. No. 91-397, 1970 U.S.C.C.A.N. 3277, 3283–84; *accord, e.g.*, H.R. Rep. No. 94-196, at 58 (§5 applies to "new voting enactment[s]," "law[s] newly enacted by a State legislature"); S. Rep. No. 97-417, at 7, 10, 1982 U.S.C.C.A.N 177, 184, 187 ("new laws"); S. Rep. No. 109-295, at 10 (2006) ("voting laws"). In addition, the innumerable examples of discriminatory conduct to which the legislative history refers as justifying the preclearance mechanism have, so far as we can tell, uniformly involved legislative and executive conduct.[10] Although it is always difficult to prove a negative, we have found no indication in the Voting Rights Act's vast legislative history that Congress ever contemplated §5's application to ordinary exercises of judicial review.

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[10] *See, e.g.*, H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. at 2442–43, 2447; S. Rep. No. 89-162, 1965 U.S.C.C.A.N. at 2545–46; H.R. Rep. No. 91-397, 1970 U.S.C.C.A.N. at 3283; H.R. Rep. No. 94-196, at 10; S. Rep. No. 94-295, at 17–18, 1975 U.S.C.C.A.N. 774, 783–84; H.R. Rep. No. 97-227, at 4, 13–19 (1981); S. Rep. No. 97-417, at 6, 10–14, 1982 U.S.C.C.A.N. at 182–83, 187–91; H.R. Rep. No. 109-478, at 7, 22–23, 36–43, 2006 U.S.C.C.A.N. 618, 621–22, 631–32, 640–48; S. Rep. No. 109-295, at 14–15.

3. *There is no basis in this Court's precedent for requiring preclearance of* Stokes *and* Riley.

The district court purported to ground its novel interpretation of §5 in this Court's precedent. And the citations to *Perkins v. Matthews*, 400 U.S. 379 (1971), *City of Lockhart v. United States*, 460 U.S. 125 (1983), and *Branch v. Smith*, 538 U.S. 254 (2003), might lend the district court's decision an air of plausibility. J.S. App. 6a–7a. But the district court's case-law analysis is strained. The court ignored the clear teaching of the most pertinent of this Court's decisions, and misapplied several others.

a. *The district court's decision is contrary to* Abrams v. Johnson.

The district court's view that §5 operates to freeze unconstitutional practices in place is foreclosed by *Abrams v. Johnson*, 521 U.S. 74 (1997).

Abrams arose out of the 1990 census, in which Georgia picked up an extra congressional seat. The state legislature submitted two redistricting plans to DOJ for preclearance. Citing an ACLU-sponsored "max-black" plan, which contained an additional majority-black district, DOJ refused to preclear either of the Legislature's proposals. *Abrams*, 521 U.S. at 80. "[T]o gain preclearance," the legislature adopted a third plan "us[ing] the ACLU's max-black plan as a model." *Id.* DOJ precleared the plan, and the State thereafter implemented it in an election cycle. *Id.* A group of white plaintiffs later filed suit under the Equal Protection Clause, *see id.* at 81, and in *Miller v. Johnson*, 515 U.S. 900 (1995), this

Court invalidated Georgia's plan as an unconstitutional racial gerrymander.

On remand, the state legislature deadlocked, and a federal district court ended up drawing its own plan. 521 U.S. at 82. In *Abrams*, this Court considered and rejected a §5 challenge to that plan and, in so doing, addressed in detail the issue of the appropriate §5 baseline (or, as the Court called it there, "benchmark"). *Id.* at 96. Importantly for present purposes, the Court rejected any contention that the plan invalidated in *Miller* could, "constitutional defects and all," serve as the baseline: "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." *Id.* at 97.

The Alabama Supreme Court's decision in *Stokes* operates the same way here that this Court's decision in *Miller* operated in *Abrams*. In *Abrams*, the plan held unconstitutional in *Miller* could not serve as the §5 baseline even though it had been both precleared and used to conduct elections. So too here, Act No. 85-237, held unconstitutional in *Stokes*, cannot serve as a §5 baseline even though it was precleared and implemented (in a sense, *see infra* Part III) in an election cycle. In neither case can §5 be "used to freeze in place" an unconstitutional practice, thereby requiring a State to act *ultra vires* absent federal permission to stop doing so.

Neither of the appellees' responses to *Abrams* is persuasive. First, they say that *Abrams* is "irrelevant" because the Court there was not specifically addressing the §5 coverage question presented here—namely, "what constitutes a change requiring preclearance under §5." M.D.A. 20. Classic red herring. It is true that the court-drawn plan in *Abrams* was not, under *McDaniel v. San-*

chez, 452 U.S. 130 (1981), technically subject to preclearance. But it is also undeniable that this Court in *Abrams* subjected the court-drawn plan to a standard §5 retrogression analysis. (It did so pursuant to direction in *McDaniel* itself that court-drawn plans should comply with "the appropriate Section 5 standards." *Id.* at 149.) Key to that §5 retrogression analysis, this Court emphasized, was "fixing on a benchmark." 521 U.S. at 96. And with respect to that critical question, this Court held, in no uncertain terms, that a practice adjudicated to be unconstitutional *cannot* serve as a §5 baseline. *Id.* at 97.

Second, the appellees assert that "*Abrams* addressed only legislative plans that violate the *federal* constitution." M.D.A. 20 (emphasis in original). It is entirely unclear, though, why that should matter. Just as a state statute can be unconstitutional, and thus unenforceable, as a matter of federal law, it can be unconstitutional, and just as unenforceable, as a matter of state law. In an attempt to manufacture a distinction between federal and state constitutional protections, the appellees argue that treating the unconstitutional max-black plan in *Abrams* as a baseline would have "entrench[ed] the unconstitutional practices the Voting Rights Act is designed to root out," whereas "[r]equiring Alabama to temporarily enforce a state statute that violates the state constitution's prohibition against certain forms of local legislation in no way conflicts with the basic purposes of the Voting Rights Act." M.D.A. 20–21. The argument has superficial appeal, but closer inspection reveals that it rests on a faulty premise. The "unconstitutional practice[]" of race-conscious redistricting that doomed the Georgia plan in *Miller* was undertaken *in the name of* the Voting Rights Act—specifically to obtain preclearance—not in spite of it. *See Miller*, 515 U.S. at 921–22.

In *Miller* and cases like it, the relationship between §5 and the federal Constitution is unique only in the sense that it is uniquely antagonistic. *See id.* at 927–28; *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) ("[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 seem to be what save it under §5.").

Abrams is clear: A practice authoritatively determined to be "unconstitutional" cannot be "fr[ozen] in place" as a §5 baseline. The district court's contrary decision cannot stand.

b. The precedents invoked by the district court do not support its decision.

The district court's decision rests on an adding-up of misreadings of two separate lines of precedent. In the district court's view, (1) statements in cases like *Perkins v. Matthews* and *City of Lockhart v. United States* that certain voting practices unlawful under state law are nevertheless deemed to be "in force or effect on" a jurisdiction's statutory coverage date, plus (2) statements in cases like *Branch v. Smith* that court decrees can sometimes give rise to Section 5 "changes," equal a conclusion that §5 required preclearance of *Stokes* and *Riley*. J.S. App. 6a–7a. But the district court's precedential math doesn't add up. Even taken together, these two lines of cases do not support the remarkable proposition that §5 requires preclearance of a state court's exercise of its core judicial-review function to invalidate (and later decline to revive) a post-1964 enactment.

1. *Perkins* and *Lockhart*. More than anything else, a misunderstanding of *Perkins* and *Lockhart* drove the district court's decision. The district court considered

itself bound to find §5 coverage on the ground (so it thought) that those two decisions require courts to determine the §5 baseline, as a blanket matter, "'without regard for [its] illegality under state law.'" J.S. App. 7a (quoting *Lockhart*, 460 U.S. at 133, and citing *Perkins*, 400 U.S. at 394–95). Given that starting point, the district court found it easy to discount the Alabama Supreme Court's authoritative determination in *Stokes* that Act No. 85-237 violated the Alabama Constitution. *See id.* And indeed, because in the district court's view the 1985 act was locked in as the baseline as soon as it was precleared and "put into force and effect with the election of [Sam] Jones in 1987," *id.*, any court decision, like *Stokes* or *Riley*, that came later and declared the 1985 act not to be the law must have worked a §5 "change" and required DOJ authorization.

The district court's analysis ended wrong because it started wrong. The court simply plucked the without-regard-for-state-law language out of *Perkins* and *Lockhart* without considering whether, in light of the context in which those cases were decided, their logic was transferrable to this one. Closer consideration would have revealed that *Perkins* and *Lockhart*, while perhaps superficially similar to this case, are in fact quite different.

In both *Perkins* and *Lockhart*, the key question was what state voting practices were "in force or effect" on the statutory coverage date: In *Perkins*, as here, that date was November 1, 1964; in *Lockhart*, it was November 1, 1972. Both cases arose (as *Perkins* put it), in the "peculiar context," 400 U.S. at 394, in which covered jurisdictions had, *as of the coverage date*, conducted elections in a manner that arguably violated state law. In *Perkins*, the city of Canton, Mississippi had elected al-

dermen by wards, despite an existing statute requiring at-large voting; in *Lockhart*, the city of Lockhart, Texas had used numbered posts to elect commissioners despite uncertainty about its authority under state law to do so. The question in both cases was whether the coverage-date practice, although arguably illegal, was nonetheless part of the baseline. "[B]ased on the plain reading of [§5's] language," *Lockhart*, 460 U.S. at 133, this Court answered yes in both cases: So long as the practice was actually "in force *or* effect on" the applicable coverage date—*i.e.*, so long as it was actually being used by the jurisdiction on that date, regardless of its alleged unlawfulness under state law—then it fixed the statutory baseline, and the jurisdiction could not change it without seeking preclearance. *See id.* at 132–33; *Perkins*, 400 U.S. at 394–95.

Two critical aspects of *Perkins* and *Lockhart* render their holdings irrelevant here. The first and most obvious distinction is that neither *Perkins* nor *Lockhart* involved, as this case does, a state supreme court's authoritative determination of state law. Indeed, the *Lockhart* Court emphasized that the lawfulness of the numbered-post practice was "not entirely clear" and that, in fact, "[t]here d[id] not appear to be any Texas case law on the subject." *Lockhart*, 460 U.S. at 132 & n.6. Although the unlawfulness of the ward-election practice at issue in *Perkins* might have seemed somewhat clearer, the fact remains that neither decision required, as the district court's interpretation here so conspicuously does, "state courts [to] live with the insult that their judgments can be revised by a federal agency." *Alaska*, 540 U.S. at 513 (Kennedy, J., dissenting). It is one thing to "determine [a §5] baseline 'without regard for [its] legality under state law'" (J.S. App. 7a) in the absence of any definitive

pronouncement of what state law is. It is quite another to ignore a state supreme court's binding determination that a supposed baseline (here, Act No. 85-237) is and always has been void as a matter of the State's organic law—or, what amounts to the same thing, to deem the state court's exercise of judicial review a "change" that itself requires DOJ approval.

The second distinction concerns the "peculiar context" in which *Perkins* and *Lockhart* arose. Neither of those cases required a determination, as this case does, whether an unlawful state statute precleared *after* the statutory coverage date is automatically entitled to §5 baseline status. Rather, both cases asked what the applicable practice was *on* the statutory coverage date: In *Perkins*, whether the allegedly unlawful ward-election practice was, in fact, "'in force or effect *on November 1, 1964*,'" 400 U.S. at 394 (quoting §5) (emphasis added); and in *Lockhart*, whether the arguably unlawful numbered-post practice was, in fact, "'in force or effect *on November 1, 19[72]*,'" 460 U.S. at 133 (quoting §5) (emphasis added).

That fact matters for two reasons. Initially, the conclusion that the allegedly unlawful practices in *Perkins* and *Lockhart* became a part of the relevant baseline is much easier to square with §5's language than would be a similar conclusion about Act No. 85-237. Both *Perkins* and *Lockhart* turned on a "plain reading of [§5's] language." *Id.* Here, by contrast, there is no plausible argument that the 1985 act was, in the words of §5, "in force or effect on November 1, 1964." If that statute was ever "in force or effect," it was not until 1985 at the very earliest.

Moreover, this contextual reading of *Perkins* and *Lockhart* makes sense. Congress had good reason in 1965 to freeze into place *all* state practices (even arguably illegal ones) that were then actually "in ... effect." As we have explained, §5 was Congress' response to some States' maneuvering to evade federal-court decrees by switching to new voting practices that the decrees did not cover. *See supra* at 31–33. The problem was that the target was constantly moving. Congress in 1965 needed a timeout—an opportunity to freeze the legal landscape as of November 1, 1964, and then to move forward from there. Allowing States to fudge the practices actually in effect on that date on the (perhaps pretextual) ground that they were contrary to state law would have undermined Congress' program. States could have shifted their baselines to unknown, perhaps invidious practices—ones that had been neither known to Congress in 1965 nor precleared by DOJ. To that possibility, *Perkins* and *Lockhart* said no.

But the same logic doesn't hold when, as here, the practice determined to be invalid as a matter of state law is one that was not enacted or implemented until long *after* November 1, 1964. The Alabama Supreme Court's determination in *Stokes* that Act No. 85-237 was unconstitutional, for example, did not cause Alabama to revert to some unknown or sinister practice. It instead caused Alabama to revert to the practice (gubernatorial appointment) in effect on Alabama's November 1, 1964 coverage date. The Alabama Supreme Court's decisions here thus do not even implicate, let alone undermine, the timeout Congress called in 1965.

Perkins and *Lockhart* thus stand for nothing more and nothing less than what they say: "The proper com-

parison is between the new system and the system actually in place *on November 1, 19[64]*, regardless of what state law might have required." *Lockhart*, 460 U.S. at 132 (emphasis added). What they do not establish is that the invalidity of a *post*-1964 enactment under state law—particularly where, as here, that invalidity has been authoritatively established by the State's highest court—is irrelevant for the purposes of determining whether that practice ought to be considered part of the *post*-1964 baseline.

2. *Branch*. Perhaps in an effort to smooth over the first of the two substantial problems with its reliance on *Perkins* and *Lockhart*—namely, the absence of any authoritative state-court determination of state law—the district court cited *Branch v. Smith* for the proposition that "a §5 change may be brougnt about by state court decisions." J.S. App. 6a. That statement may be true as far as it goes—but that isn't very far. Neither *Branch* nor any other decision of this Court supports the proposition that state-court decisions like *Stokes* and *Riley*—those reflecting an exercise of judicial-review to invalidate a post-1964 voting practice on state-law grounds, thereby reaffirming the practice in place on the statutory coverage date—constitute §5 "changes."

Branch itself is way off the mark. That case involved §5's application to a Mississippi chancery-court decree reapportioning congressional districts. The decree at issue there has nothing in common with the Alabama Supreme Court's decisions in *Stokes* and *Riley*. The chancery court in *Branch* was not exercising a core judicial-review function; it was drawing a redistricting map, *see* 538 U.S. at 258–61, which, whether undertaken by a court or otherwise, is quintessentially a "legislative

task," *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion), and a "highly political" one at that, *Growe v. Emison*, 507 U.S. 25, 33 (1993). It is one thing to require a State to preclear court decrees that assume the mantle of the legislature and self-consciously exercise a political function; it is quite another to require preclearance of state-court decisions, like *Stokes* or *Riley*, that embody an exercise of the core judicial duty to say what the law is.

3. *Hathorn.* Although the district court made nothing of it, the appellees have also cited a footnote from this Court's decision in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), as support for extending §5 to encompass the Alabama Supreme Court's decisions here. M.D.A. 18–19. The district court wisely declined to rely on *Hathorn*, which is inapposite. That case involved a 1964 Mississippi election statute that, as a result of doubts about its constitutionality, had never been enforced. Litigation filed in 1975 culminated in Mississippi Supreme Court orders excising the unconstitutional portions of the statute and directing enforcement of the reformulated statute without §5 preclearance. *See* 457 U.S. at 257–61.

Although the snippet of language the appellees quote—"[T]he presence of a court decree does not exempt [a] contested change from §5," *id.* at 265 n.16—might appear to support their cause, that is only because they wrench it out of context. Key to understanding the *Hathorn* dictum about "court decree[s]" is the fact that the Mississippi Supreme Court there had, in two respects, ordered enforcement of an *unprecleared* election practice. First, although the 1964 statute itself "predate[d] the Voting Rights Act," it had not been made part of Mississippi's coverage-date baseline because it

had never been administered in any way and thus was not, under *Perkins*, "*in fact* 'in force or effect ... on November 1, 1964.'" 457 U.S. at 265 n.16. Second, when the Mississippi Supreme Court ordered enforcement of the reformulated statute, it was ordering enforcement of what was effectively a new creation. It makes sense to require §5 preclearance when, as in *Hathorn*, a state court orders implementation of a practice that was neither part of the coverage-date baseline nor subsequently precleared. Federal approval of *some* sort is necessary to an election practice's enforceability, and "if §5 did not encompass th[e *Hathorn*] situation, covered jurisdictions easily could evade the statute by declining to implement new state statutes until ordered to do so by state courts." *Id.* But that logic—which merely prevents States from "laundering" unprecleared practices through the courts—does not translate to the situation here, in which a state court's decision has the effect of simply reaffirming the practice that was "in force or effect on November 1, 1964."

B. The District Court's Interpretation Impermissibly Exacerbates the Federalism Costs Already Imposed by Section 5.

Section 5's preclearance mechanism, as this Court and its individual members have repeatedly recognized, is "an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley*, 502 U.S. at 500–01; *accord, e.g.*, *Miller*, 515 U.S. at 926; *Dougherty County*, 439 U.S. at 48 (Powell, J., dissenting) (collecting citations). Given that "undeniable" fact, *Sheffield*, 435 U.S. at 141 (Stevens, J., dissenting), established canons counsel interpretive restraint. *See, e.g.*, *Raygor*, 534 U.S. at 543

(clear-statement principle); *Miller*, 515 U.S. at 926–27 (constitutional avoidance doctrine). In at least three critical respects, the district court's reading "exacerbate[s] the 'substantial' federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's constitutionality." *Bossier Parish II*, 528 U.S. at 336 (quoting *Lopez*, 525 U.S. at 282).

1. First, and most obviously, under the district court's interpretation, the Alabama Supreme Court, the "ultimate expositor[]" of Alabama law, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), is effectively stripped of its authority to decide pure state-law questions and is required, instead, to obtain the federal government's blessing to exercise that sovereign responsibility. The threat to state courts' judicial independence posed by the district court's interpretation is manifest. "Judges cannot, without sacrificing the autonomy of their office, put onto the scales of justice some predictive judgment about the probability that an administrator might reverse their rulings." *Alaska*, 540 U.S. at 512 (Kennedy, J., dissenting). Moreover, the injury here is particularly acute because state courts in §5 jurisdictions are, on the district court's view, "subject to being overturned, not just by any agency, but by an agency established by a different sovereign." *Id.* Before requiring "state courts [to] live with the insult that their judgments can be revised by a federal agency, the Court should at least insist upon a clear instruction from Congress." *Id.* at 513. As we have shown, there is none here.

2. Second, where, as happened here, DOJ refuses to sign off on a state court's decision, the State is made, as appellees freely and repeatedly admit, to "keep in place a

practice held invalid under state law" and thus to do something that flatly violates its own organic law. M.D.A. 23; *accord id.* at 10, 21. The district court's decision thereby effectively allows the federal government to dictate the substance of state law and comes perilously close—if it does not go all the way—to authorizing precisely the sort of "commandeering" of state governmental processes that the Constitution condemns. *See Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992). It is a short step from requiring a State to "enact or enforce" a particular statute (plainly forbidden by *New York* and *Printz*) to requiring a State to *maintain and enforce* a statute that the state supreme court, as the ultimate arbiter of state law, has held is void and, indeed, is not "law" at all. Particularly where, as in Alabama, a law stricken as unconstitutional is deemed to have been void *ab initio*, a federal directive requiring the State to keep and enforce that statute is tantamount to forced reenactment.

To be clear, the affront to state sovereignty is significantly greater here than in the "typical" §5 case, in which a state legislature enacts a new law but DOJ refuses to preclear it, thereby sending the State back to the old law. The difference is between (1) in the typical scenario, forcing a State to keep a law that that it *does not want to have*; and (2) here, forcing a State to keep a law that the ultimate arbiter of state law has definitively determined it *cannot constitutionally have*. The federalism concerns, therefore, are of a different order of magnitude here.

3. Finally, there is reason to believe that if it were interpreted to require preclearance of state-court deci-

sions like *Stokes* and *Riley*, §5 would not be "congruent and proportional," within the meaning of *City of Boerne v. Flores*, 521 U.S. 507 (1997), to any threat posed to Fifteenth Amendments rights in this particular context. This Court's recent decisions fleshing out the congruence-and-proportionality standard make clear that the constitutionality of Fourteenth and Fifteenth Amendment enforcement legislation must be determined, not indiscriminately, but "as it applies to [a particular] class of cases." *Tennessee v. Lane*, 541 U.S. 509, 530–31 (2004); *see also id.* at 551 (Rehnquist, C.J., dissenting) (commenting on "as applied analysis"). Here, there is no indication that Congress, when it enacted §5, had before it evidence of state courts exercising their judicial-review authority so as to "stay[] one step ahead of" federal authorities by "maneuver[ing]," "contriving," or "switch[ing]" to new and discriminatory voting practices. *See supra* at 33–33.

Whether or not the district court's novel reading of §5 would actually be found to cross any constitutional line in the final analysis, it certainly raises constitutional questions and, in any event, substantially ups the federalism ante relative to the more typical §5 scenario. Just as this Court has refused on federalism grounds to indulge questionable readings of §5 in the past, it should do so here. *See Bossier Parish II*, 528 U.S. at 336; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (rejecting interpretation that would "increase further the serious federalism costs already implicated by §5"); *Miller*, 515 U.S. at 926–27 (rejecting interpretation of §5 that could have presented "troubling and difficult constitutional questions"). What the Court said in *Miller* applies here as well: The "belief in *Katzenbach* that the federalism costs exacted by §5 preclearance could be jus-

tified by" certain state actors' transparent efforts during the 1960s to perpetuate voting discrimination "does not mean they can be justified in the circumstances of this litigation." *Id.* at 926–27. Because it is not "the manifest purpose" of §5 to freeze in place a post-1964 enactment that the Alabama Supreme Court has held, for reasons altogether unrelated to those that underlie the Voting Rights Act, independently violates the Alabama Constitution, this Court should "hesitate before interpreting the statute to effect such a substantial change in the balance of federalism." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002).

C. The District Court's Interpretation Is Unworkable and Unnecessary.

Not only is the district court's interpretation contradicted by all relevant indicia of §5's proper scope, and not only does it risk impermissibly exacerbating federalism costs, but it is also supremely impractical and, to boot, altogether unnecessary to protect against racial discrimination.

1. The district court's interpretation—which if adopted by this Court would require, for the first time, preclearance of every state-court decision that affects voting in any way—would open up a Pandora's box of possible challenges and would risk destabilizing the decisional law of all sixteen §5 jurisdictions.[11] As is demonstrated by this litigation, which centers on a 20-year-old case, no decision rendered by any state court in any §5 jurisdiction during the last 40+ years would be safe from attack. Innumerable state-court decisions would become, in an instant, ripe for §5 take-down. This case, of

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[11] *See supra* note 2.

course, proves that the threat is not hypothetical. For nearly two decades, *Stokes* was thought to be the settled law of Alabama. Now, both it and *Riley* have (so Westlaw says) been "[c]alled into [d]oubt" by the district court's decision. Under the district court's reading of §5, state and local officials charged with preclearance responsibilities would presumably need to scour the reporters for every post-1964 court decision that even arguably affects voting and submit *all of them* to DOJ for preclearance. Alabama's experience in this case indicates that, in all likelihood, some of those decisions—long assumed to be valid and, perhaps, spawning entire legal doctrines—wouldn't make the cut. The upheaval in the decisional law of covered jurisdictions could be staggering.

2. Moreover, there simply is no overriding *need* to stretch an already-stretched §5 to reach state-court decisions like those at issue here. Even if what this Court has called "the extraordinary burden-shifting procedures of §5" do not apply, *Bossier Parish II*, 528 U.S. at 335, the full panoply of established remedies for enjoining discriminatory voting practices remains available. Most notable among those remedies is §2 of the Voting Rights Act, which broadly prohibits States and localities from "impos[ing] or appl[ying]" any "standard, practice, or procedure" in a manner "which results in a denial or abridgment of the right" to vote "on account of race or color." 42 U.S.C. §1973(a). Civil actions under 42 U.S.C. §1983 to enforce Fourteenth and Fifteenth Amendment rights continue to provide protection as well. There is, therefore, no reason to believe that, absent the district court's unprecedented reading of §5, any plaintiff would be left without proper recourse.

III. Because Under *Young v. Fordice*, Act No. 85-237 Was Never "In Force or Effect," *Stokes* And *Riley* Did Not Mark Section 5 "Changes."

There is, in addition, an alternative basis for reversal here—one tied more specifically to the unique circumstances of this particular case. Even if §5 could, as a general matter, be read to cover state-court decisions like *Stokes* and *Riley*, *Stokes* and *Riley* themselves would not be covered. The reason is this: Act No. 85-237 was invalidated the first time anyone ever attempted to administer it and, indeed, in the course of litigation that was filed *before* any election was conducted under its provisions. That fact is critical because under this Court's unanimous decision in *Young v. Fordice*, a State's temporary misapplication of state law, even if precleared by DOJ and actively administered, does "not become part of the baseline against which [the Court is] to judge whether future change occurred" under §5. 520 U.S. 273, 283 (1997). On the facts here, Act No. 85-237—and the single election mistakenly conducted under it—cannot be regarded as anything other than a temporary misapplication of Alabama law. The 1985 act's special-election practice, therefore, never became the §5 baseline. Because, instead, gubernatorial appointment remained, as it had since November 1, 1964, the applicable baseline, neither *Stokes* nor *Riley*, both of which merely reaffirmed the propriety of gubernatorial appointments, could have marked "changes" in state practices for §5 purposes.

To serve as a §5 baseline, a voting practice must at least be, in the words of the statute, "in force or effect." 42 U.S.C. §1973c(a). Here, the district court determined that the 1985 act was the appropriate baseline because it

had been both precleared and, more importantly for present purposes, "put into force and effect with the election of [Sam] Jones in 1987." J.S. App. 7a. The question is whether Jones' 1987 election—enveloped as it was by a cloud of litigation from which it never emerged—can count as having put the 1985 act into "force or effect" within the meaning of §5. Under this Court's unanimous decision in *Young*, it can't.

In *Young*, Mississippi's Secretary of State had obtained DOJ preclearance of, and had actively administered, a provisional voter-registration plan designed to effectuate the National Voter Registration Act. *See* 520 U.S. at 277–78. State officials registered some 4,000 voters under the plan, but later ceased implementation after concluding that the state legislature would not ratify it. *Id.* at 278. State officials then set about the business of "notify[ing] the 4,000 registrants that they were not," in fact, "registered to vote in state or local elections." *Id.* This Court rejected the contention that the provisional plan was the §5 baseline against which later registration practices were to be compared; in particular, the Court reasoned that the plan had never been "in force or effect" within the meaning of §5. In so holding, the Court acknowledged, by citation to *Perkins* and *Lockhart*, that "the simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never 'in force or effect'" for §5 purposes. *Id.* at 283. After all, the *Young* Court explained, a State "might maintain in effect for many years" a plan that "technically, or in one respect or another, violated some provision of state law." *Id.* But Mississippi's provisional NVRA plan, the Court explained, was different: When "taken together," the "circumstances" surrounding the plan's implementation and prompt abandonment showed

that the plan amounted to a temporary misapplication of state law that was never "in force or effect" for §5 purposes. *Id.*

Similar circumstances require reversal here. Act No. 85-237 had not been on the books for "many years," *id.*, when the Alabama Supreme Court decided *Stokes*. Gubernatorial appointment had indisputably been the law from 1868 to 1985. *See supra* at 6–7. The first and only time that anyone ever attempted to put the 1985 act's contrary practice into "force or effect" was in 1987, when the first post-1985 vacancy arose on the Mobile County Commission. But in April 1987, two months *before* any election was to take place, Willie Stokes filed his constitutional challenge to the act. Although the trial court rejected Stokes' challenge and allowed an election to go forward in June 1987, the Alabama Supreme Court thereafter reversed the trial court's decision. In so doing, the Alabama Supreme Court effectively held (albeit not in precisely these words) that the 1985 act, the 1987 election, and the trial court's decision allowing the election to proceed were all "temporary misapplication[s] of state law." *Young*, 520 U.S. at 282. Like the Mississippi officials in *Young*, Mobile County officials "did not intend to administer an unlawful plan"; they proceeded with the election only after the trial court told them (erroneously, as it turns out) that an election was permissible. *Id.* at 283. And like the Mississippi officials, Alabama officials abandoned Act No. 85-237's special-election procedure "as soon as its unlawfulness became apparent, *i.e.*, as soon as it became clear" that it was unconstitutional as a matter of state law. *Id.*

There are no relevant differences between this case and *Young* that would justify a contrary result here. To

be sure, this Court in *Young* took note of—and attributed some significance to—the facts that Mississippi's plan had been in place for only 41 days and that no election had been conducted under it. *See id.* Here, it took more than a year for Stokes' challenge to wind its way through the court system, and Mobile County conducted one election during that time. But the relatively short delay and the solitary election can only be chalked up to the vagaries of the litigation process. Stokes filed his challenge at the earliest possible juncture, well before any election was held. The election went forward only because (1) the trial court misapplied Alabama law and (2) it took a year for the Alabama Supreme Court to correct the trial court's error. In light of the Alabama Supreme Court's undisputed role as "the *final* arbiter of Alabama law, with ultimate authority to oversee and rule upon the decisions of the lower State courts," *Ex parte James*, 836 So. 2d 813, 834 (Ala. 2002), this case could not possibly turn on the fortuity that the trial court, which got the first shot at considering the 1985 act's constitutionality, happened to have gotten state law wrong. Nor can this case turn on the fact that it took the Alabama Supreme Court a year, rather than 41 days, to fix the trial court's error. Some modest delay is the price of deliberate decisionmaking and, in any event, is a fact of life in American courts. The dispositive facts here are (1) that the 1987 special election was bracketed by litigation challenging its validity and (2) that it did not survive that challenge. *Cf. Perkins*, 400 U.S. at 400 (Harlan, J., concurring in part and dissenting in part) (reasoning that even a *post*-election challenge "to have [an] election set aside" would prevent an unlawful practice from being "in force or effect").

Nor can *Young* be distinguished, as the appellees suggest, on the ground that it merely involved a "*proposed* statute" that "was ultimately never enacted." M.D.A. 21. As a formal matter, the Mississippi plan was more than a "proposed statute"; Mississippi's Secretary of State had promulgated the plan in an administrative "implementation manual" billed as "Mississippi's plan to administratively implement NVRA." Br. for the United States at 6, *Young* (No. 95-2031). Section 5 puts informal administrative rules on the same footing as formal enactments like Act No. 85-237, *see NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985), and, indeed, DOJ wouldn't have considered preclearing Mississippi's plan, let alone approved it, if it hadn't been a "final enactment or administrative decision," 28 C.F.R. §51.22 (a). Moreover, as a practical matter, it is not true, as the appellees put it, that the Mississippi plan was "never born." M.D.A. 21. Until the plan was withdrawn, the plan was "born" in every way Act No. 85-237 was (or wasn't). Mississippi officials submitted the plan to DOJ—which precleared it—and then registered some 4,000 people under its provisions. What deprived the Mississippi plan of §5 baseline status was not its lack of implementation or treatment as binding law—for it was, in fact, implemented and treated as binding law—but the fact that it was withdrawn as soon as it was determined that the plan was actually *not* "law" at all. Because that is exactly what happened here, Act No. 85-237 was no more "in force or effect" than was the Mississippi plan at issue in *Young*.

Because, under *Young*, Act No. 85-237 was never "in force or effect" for §5 purposes, its provision for special elections never became part of the baseline for comparing future changes in Alabama law. For this reason—

and independently of the arguments in Part II—*Stokes* and *Riley*, which merely confirmed the longstanding rule that vacancies on the Mobile County Commission should be filled through gubernatorial appointment, did not mark "changes" in voting practices that required §5 pre-clearance.

CONCLUSION

For the foregoing reasons, this Court should take jurisdiction and reverse the district court's decision.

Respectfully submitted,

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APPELLANT'S BRIEF

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No. 07-77

In the

Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

YVONNE KENNEDY, JAMES BUSKEY and WILLIAM CLARK,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF

I. The Court Has Jurisdiction Over This Appeal.

On jurisdiction, the sole remaining dispute is whether the district court's August 2006 order was a final judgment. As the Government has correctly recognized (U.S. Br. 10–12), it was not.

Rather than respond to the points raised in our opening brief, the appellees have advanced a new argument—namely, that the district court entered a "remedy," and thus "conclusively resolved" the third prong of the coverage analysis under *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), when it "afford[ed] Alabama an opportunity to obtain preclearance." Red Br. 26. For support, the appellees cite decisions of this Court observing that when an unprecleared change has already been implemented, "it might be appropriate for the district court to afford local officials an opportunity to seek federal approval" before undoing the change. *Lopez v. Monterey County*, 519 U.S. 9, 21 (1996) (citing *Berry v. Doles*, 438 U.S. 190 (1978), and *Perkins v. Matthews*, 400 U.S. 379 (1971)).

Those decisions, though, have nothing to do with finality. They merely confirm an uncontroversial proposition—that it was "appropriate" for the district court to give the State an opportunity to preclear *Stokes v. Noonan* and *Riley v. Kennedy* before proceeding further with the case. But the fact that the district court acted *appropriately*—or even that its sensible decision to allow the State time might plausibly be described as a "remedy," Red Br. 27—does not mean that it acted *finally*. There are all kinds of appropriate remedies that do not finally resolve litigation—orders compelling discovery,

transferring cases, etc. Particularly given that the August 2006 order contemplated "revisit[ing] the issue of remedy" (J.S. App. 9a), that order's allowance of time cannot be deemed a "final" decision requiring immediate appeal.[1]

II. The Alabama Supreme Court's Decisions in *Stokes* and *Riley* Were Not Section 5 "Changes."

A. The Appellees' Efforts To Recharacterize the Case Are Unavailing.

Before getting into the particulars on the merits, we need to reset the stage briefly. The appellees seek to sidestep many of the key issues by reframing the case in two significant respects. The first of these moves mischaracterizes the question presented, and the second mischaracterizes our position.

1. The appellees first try to recast this as a routine §5 case in which the Alabama Supreme Court was, at most, only incidentally involved. They repeatedly assert that Governor Riley just "decided"—seemingly on his

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[1] The appellees' amicus Lawyers' Committee asserts that this case is moot; even if Governor Riley were to prevail, it says, the district court would have no authority to reinstate Juan Chastang to his rightful position. That is incorrect. If §5 did not require preclearance of the *Stokes* and *Riley* decisions on which Chastang's appointment was based, then Chastang should never have been removed, there should never have been a special election in October 2007, and Chastang should be serving as a commissioner today. Reversal here, as the Government has explained, would nullify the district court's judgment and lead to Chastang's "reinstate[ment] to complete his term, which runs through November 2008." U.S. Br. 5 n.1. The Lawyers' Committee points to no principle of law or equity that would prevent the district court from remedying the wrong resulting from its own erroneous order.

own—to fill the commission vacancy by appointment rather than special election and, therefore, that this case is no different from any other in which a state legislature opts to replace an elected office with an appointed one. *See* Red Br. 1, 2, 15, 33, 35, 47; *accord* U.S. Br. 12.

The strategy behind that move is understandable enough. The notion that a federal executive-branch official might be empowered to veto a state court's exercise of judicial review (as opposed to a legislator's or administrator's policy choice) is what heightens the federalism concerns here and makes this §5 case so different from all that have come before it. But the appellees' recharacterization has no basis in reality. In filling the commission vacancy, Governor Riley was not choosing willy-nilly between appointments and elections. To the contrary, he was obeying the clear mandate of the Alabama Supreme Court, which had definitively held in *Stokes* (and then reconfirmed in *Riley*) that, under applicable Alabama law, vacancies on the Mobile County Commission "*shall* be filled by appointment by the Governor." Ala. Code §11-3-6 (J.A. 118) (emphasis added). Governor Riley could not have ignored that court's judgment without violating fundamental state separation-of-powers principles. *See Opinion of the Justices No. 338*, 624 So. 2d 107, 110 (Ala. 1993) (political branches are bound by "an order issued by a court of competent jurisdiction that interprets the constitution"). In the wake of *Stokes* and *Riley*, Governor Riley no more "decided" to fill the commission vacancy by appointment than the President "decides" to fill vacancies on this Court by appointment. *See* U.S. Const. Art. II, §2.

It is thus unsurprising that this case has always been about whether §5 required preclearance of the Alabama

Supreme Court's decisions. That is how the appellees argued the case to the district court. *See, e.g.*, Doc. 15, p. 2 ("Decisions of state courts modifying election procedures are 'changes' that must be submitted for preclearance."). That is how the district court decided the case. *See, e.g.*, J.S. App. 1a ("[T]his three-judge court held that two Alabama Supreme Court decisions, *Stokes v. Noonan* and *Riley v. Kennedy*, must be precleared before they can be implemented." (citations omitted)); *id.* at 3a, 4a, 5a, 6a, 7a–8a (all same). And that is how DOJ's Voting Section understood the case, too. *See, e.g.*, M.D.A. App. 3a (The district court "rul[ed] that the State of Alabama submit the two decisions for preclearance under Section 5."). In any event, whatever formalism the appellees might want to introduce now, it is clear that the *effect* of the district court's decision is to require preclearance of *Stokes* and *Riley*.

2. Having initially mischaracterized the case as having *nothing* to do with state-court decisions, the appellees then mischaracterize our position as seeking to exclude *all* state court decisions—indeed, any alteration in voting practices in which a state court is in any way "involved"—from §5's scope. *See* Red Br. 34–44.

The appellees are tilting at windmills. We are *not* asking the Court to hold that all state-court orders, no matter the circumstances, fall outside §5's scope. Nor is anyone else, for that matter. The amici States, to be sure, have urged the Court to read §5 so as not to reach "state courts' interpretations of state laws affecting voting"—at least those interpretations resulting from "purely judicial rather than legislative decision-making." States Br. 27–32. That argument has considerable force. It finds support not only in the traditional view (recently

reaffirmed by this Court) that courts declare rather than *change* the law, *see Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008), but also in the fact that it was explicitly embraced by a number of courts in the 1970s and thus arguably ratified by Congress when it reenacted §5 in 1982.[2]

But the Court needn't go even that far to decide this particular case. It need only hold, as we have argued, that at the very least, when (as here) a state court exercises *Marbury*-like judicial review to declare a previously-precleared state statute unconstitutional, it does not "change" state law within the meaning of §5 practice so as to require fresh approval. *See* Blue Br. 15, 22–23, 25, 27, 32–33, 34, 38, 41, 43.

That being so, many of the appellees' counterarguments simply evaporate. Most are aimed at their own broad-brush caricature, and do not respond to the more limited argument that we have actually made. Most conspicuous, perhaps, is the appellees' persistent suggestion that the Alabama Supreme Court's decisions in *Stokes* and *Riley* are indistinguishable from a naked "policy choice[]" by one of the political branches. Red Br. 2, 36, 51; *accord* U.S. Br. 32. While some court decrees might be so legislative in character that they could plausibly be described as pure policymaking, a state court's exercise of judicial review—at issue here—is not just politics by

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[2] *See Williams v. Sclafani*, 444 F. Supp. 895, 904 (S.D.N.Y. 1977) ("[T]he text of §5 and what little legislative history there is seems to indicate that the statute was directed against the legislative and executive branches of state governments, and certainly does not indicate that it was intended to cover state court decrees."); *accord Webber v. White*, 422 F. Supp. 416, 427 (N.D. Tex. 1976) (same); *Eccles v. Gargiulo*, 497 F. Supp. 419, 422 (E.D.N.Y. 1980) (same).

some other name. *See DeKalb County LP Gas v. Suburban Gas*, 729 So. 2d 270, 276 (Ala. 1998) ("[I]t is our job to say what the law is, not to say what it should be."); *see also Republican Party v. White*, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting) ("There is a critical difference between the work of the judge and the work of other public officials."). And the fact that Alabama's judges are elected, rather than appointed, does not change that basic truth. *See id.* at 796 (Kennedy, J., concurring).

* * *

So this case *is* about state-court decisions. But it is not about *all* state-court decisions. The question, rather, is whether §5 can reasonably be read to cover *these* state-court decisions. The answer is no. Because extending §5 to require preclearance of *Stokes* and *Riley* would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (citation omitted), and because there is no "clear instruction from Congress" that it actually intended §5 to intrude so deeply into state judicial business, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 513 (2004) (Kennedy, J., dissenting) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)), the district court's novel interpretation cannot stand.

B. No Source of Statutory Meaning Supports the District Court's Interpretation.

1. Section 5's text refutes the district court's interpretation.

The appellees appear, at first glance, to be hawkish on §5's text. "Both the word 'whenever' and the word 'any'" in §5, they say, "show that Congress required preclearance of *all* voting changes made by covered jurisdictions." Red Br. 35; *accord* U.S. Br. 13 (same). But the appellees' hawkishness is selective, for they ignore the balance of what §5 says.

a. The appellees fail even to mention §5's "savings clause," which states that neither administrative nor judicial preclearance "shall bar a subsequent action to enjoin enforcement" of the precleared practice. 42 U.S.C. §1973c(a). As we have explained, DOJ has interpreted that provision to authorize individuals to "'challenge [the precleared] practice under any applicable provision of *state ... law*.'" Blue Br. 28–30 (citations omitted). We argued in our opening brief that "[i]t would be odd indeed" if the very sort of court decision that §5 sanctions—namely, one like *Stokes*, invalidating a precleared statute on a non-§5 ground—"was itself a 'change' that required a fresh approval." Blue Br. 27. In response, the appellees—and their amicus DOJ—have said nothing. Their silence is deafening, and it belies their assertion that we are seeking an "exemption" that Congress "did not bother to write into the statute." Red Br. 42.

b. While trumpeting §5's "plain" and "categorical" language, the appellees likewise repeatedly omit any reference to the fact that, by its terms, the statute requires preclearance of a voting practice "different from that in

force or effect on November 1, 1964." *See, e.g.*, Red Br. 2, 22, 32, 35. Here, the appellees don't so much ignore our position as they misstate it. Time and again, they caricature "the Governor's argument" as urging a per se rule "that a change is exempted from the preclearance requirement [if] it returns to a practice in place in 1964." *Id.* at 49; *accord id.* at 44, 46, 47. The appellees are attacking a straw man.

Our contention, as we have already said, is not that the Court needs to rethink prior dicta suggesting that, despite its language, §5 operates like a ratchet to subsume newly-precleared practices into a moveable baseline. *See, e.g., Young v. Fordice*, 520 U.S. 273, 282 (1997) ("Regardless, none of the parties asks us to look further back in time than 1994 ...."). Perhaps in the ordinary course of business—where a legislative or administrative change is at issue—§5's text should be read to embody an unwritten "assumption" that baselines can "advance as voting practices progress[] in covered jurisdictions." U.S. Br. 16. That question is not before the Court, and we take no position on it.

This, though, is no ordinary §5 case. The question here is whether by declaring Act No. 85-237 unconstitutional and void in *Stokes* (and then declining to revive it in *Riley*), the Alabama Supreme Court "changed" state law within the meaning of §5 practice. With respect to that question, we cite the "November 1, 1964" language simply to establish these points: (1) In deciding this case—which presents new and troubling federalism issues—the Court should consult all relevant textual clues for some clear indication that Congress actually intended §5 to extend so far; and (2) §5's text *cannot* provide that clear indication with respect to *Stokes* and *Riley*, which

indisputably reaffirmed the practice (gubernatorial appointment) in place "on November 1, 1964."

2. *Section 5's history and purposes undermine the district court's interpretation.*

Because the district court's decision cannot be squared with a plain reading of §5's text, one might have expected the appellees to come forward with unambiguous support from §5's legislative history and underlying purposes. They haven't.

Instead, while disregarding the 1965 House and Senate Reports—both of which plainly state that §5 was intended to address changes effected by "'statute or administrative acts,'" Blue Br. 33 (citations omitted)—the appellees cite a handful of Jim-Crow-era episodes in which state judges engaged in blatantly discriminatory behavior. *See* Red Br. 4–7, 42; NAACP Br. *passim*. The point, presumably, is to show that although Congress didn't say so, it must have been motivated by a belief about "the role state courts had played in the exclusion of black citizens" (Red Br. 42) and, accordingly, that an across-the-board "exemption of state court orders" (NAACP Br. 4) would be contrary to the purposes that underlay §5. There are two problems with that line of analysis.

As an initial matter, it responds to an argument we haven't made—namely, that *all* state-court orders, of whatever stripe, fall outside §5's ambit. The cited anecdotes involve conduct that (while engaged in by judges, to be sure) bears no resemblance to the Alabama Supreme Court's decisions in *Stokes* and *Riley*. For instance, in "crafting" and "promulgat[ing]" several literacy tests during the 1950s and 1960s (Red Br. 5–6;

NAACP Br. 18–21), the Alabama Supreme Court was not even exercising a judicial function but, rather, was wielding a delegated legislative power. *Cf. Supreme Court v. Consumers Union*, 446 U.S. 719, 731 (1980) (promulgation of a state bar code, even if a "proper function of the Virginia [Supreme] Court," was not a "judicial function" but a "legislative" task). Nor do the instances in which state-court judges issued "extra-jurisdictional decrees and orders" (for instance, to "impound[]" voter-registration records) in an effort to thwart federal investigations have any bearing here. NAACP Br. 21, 23–24; Red Br. 6. Those incidents, in which renegade judges abandoned their judicial roles, shed no light on how Congress would have approached, for example, the Alabama Supreme Court's jurisdictionally-appropriate (and concededly correct) adjudication in *Stokes* that Act No. 85-237 violated a race-neutral, generally-applicable provision of the state constitution.[3]

Moreover, only two of the episodes that the appellees and their amici cite seem to have been mentioned anywhere in the legislative record—and then, only very obliquely. First, the appellees assert that "[b]oth committee reports accompanying the Voting Rights Act" denounced "the Alabama Supreme Court's [literacy] test."

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[3] The appellees' effort (Red Br. 12 n.8) to deny the race-neutrality of Alabama Constitution §105, which generally prohibits "local law[s]" that conflict with "general law[s]," is baseless. Their historical argument rests on a fundamental misunderstanding of the difference between "home rule" (*i.e.*, the power of municipalities to make their own laws) and local laws (*i.e.*, enactments of the State Legislature pertaining to matters of purely local concern). In fact, "[t]he prohibition on special laws has been enshrined in the constitutions of no fewer than 30 states," and, in Alabama specifically, "the rule has been applied to a range of state and local laws that address ... diverse topics." Fried & Phillips Br. 19–20

Red Br. 6. To be sure, the reports condemned southern States' use of literacy tests. And unsurprisingly so; one of the Voting Rights Act's chief objectives—accomplished not by §5 but by §4—was to ban literacy tests outright in covered jurisdictions. But it simply is not a fair characterization of the record to suggest that Congress was in any way focused, in particular, on the Alabama Supreme Court's role in the creation of Alabama's test. Likewise, the appellees' attempt to leverage Attorney General Katzenbach's general introductory remarks "describing the activities of Alabama Circuit Judge James Hare" (Red Br. 42) into a particularized concern about state courts' exercises of judicial review falls well short. In fact, a review of Katzenbach's testimony reveals that it does not mention Hare by name or, for that matter, even use the word "judge" or "court."

In any event, reliance on these generalized references would be a most tenuous basis upon which to fix §5's meaning, in that neither "purport[s] to explain or interpret" §5 specifically. *Shannon v. United States*, 512 U.S. 573, 583 (1994). The legislative history addressing §5's meaning, in particular, confirms that the preclearance requirement does not extend to state-court decisions like *Stokes* and *Riley*. *See* Blue Br. 33-34.

3. DOJ's Section 5 regulations cannot save the district court's interpretation.

In the face of §5's text and legislative history, the appellees and their amici ask the Court to defer to a DOJ regulation, 28 C.F.R. §51.12. Their reliance is misplaced for two reasons.

First, §51.12 speaks to a question that is not presented here. That regulation states that "[a]ny change

affecting voting, even though it ... returns to a prior practice or procedure ... must meet the Section 5 preclearance requirement." The appellees and the Government emphasize language in the *Federal Register* indicating that §51.12 was intended to clarify that §5 covers a "voting change that returns a jurisdiction to a practice that was previously in effect (*e.g.*, to that in use on November 1, 1964)." 52 Fed. Reg. 486, 488 (1987). But even if the explanation in the *Federal Register* could be deemed dispositive of that question—and, as explained below, there is good reason to think it shouldn't be—it would resolve nothing here. The issue in this case, again, is not whether a legislative or administrative return to a 1964 coverage-date practice automatically precludes §5 scrutiny but, rather, whether a state court's exercise of judicial review to invalidate a previously-precleared statute as unconstitutional is properly understood to be a "change" within the meaning of §5 practice. With respect to *that* question, the regulations are intentionally silent: They expressly decline to address "[t]he issue of the status of changes resulting from orders of State courts." 46 Fed. Reg. 870, 872 (1981).

Second, and at any rate, the explanation on which the appellees and the Government rely renders §51.12 internally incoherent. The phrase "change affecting voting," which triggers §51.12's application, is a defined term. Specifically, it is defined to mean a practice "different from that in force or effect *on the date used to determine coverage*"—which, here, is November 1, 1964. 28 C.F.R. §51.2 (emphasis added). Thus, according to the appellees and the Government, §51.12 should be understood as follows: "Any [practice different from that in force or effect on November 1, 1964], even though it [is the same as that in use on November 1, 1964], must meet

the §5 preclearance requirement." The incomprehensibility of that reading is reason enough for refusing deference.

4. This Court's precedent provides no support for the district court's interpretation.

a. *Branch* and *Hathorn*. The Government contends that *Branch v. Smith*, 538 U.S. 254 (2003), and *Hathorn v. Lovorn*, 457 U.S. 255 (1982), "resolve the question here as a matter of *stare decisis*." U.S. Br. 15. That is incorrect. The Government's argument, like so many of the arguments in the bottom-side briefs, rests on a misunderstanding of our position as urging exclusion of *all* state court decisions from §5's ambit. U.S. Br. 9, 14, 27, 29, 31, 32.

To be sure, dicta in *Branch* and *Hathorn*[4] would seem to require preclearance of a state-court order that enforces an unprecleared legislative (or quasi-legislative) change and thus gives rise to a wholly new voting practice. But that is not what happened in this case. And because the mere "presence of a court decree does not exempt the contested change from §5," *Hathorn*, 457 U.S. at 265 n.16, those cases would likely defeat an argument that *any* "state court[] involvement" (Red Br. 33) magically immunizes a purported change from §5 scrutiny. But that is not our argument. With respect to our much narrower contention, *Branch* and *Hathorn* have little, if any, relevance.

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[4] The coverage question was not "dispute[d]" in either case. *Branch*, 538 U.S. at 262; *Hathorn*, 457 U.S. at 265. In both, "the controversy pertain[ed]" to a different issue. *Branch*, 538 U.S. at 262.

Though the appellees insist otherwise, there is a real and discernible difference between what the Alabama Supreme Court did in *Stokes* and what the Mississippi courts were doing in *Branch* and *Hathorn*. It is the difference between, on the one hand, a court exercising its core judicial "duty" to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and, on the other, a court ordering enforcement of a change that is fundamentally legislative in character. Redistricting, at issue in *Branch*, entails much more than the invalidation of an existing law; it requires a court to draw up a new electoral scheme. Accordingly, this Court has consistently described redistricting as a *legislative* task, even when undertaken by a court. Blue 43–44 (citing cases). And in *Hathorn*, both the petitioner and the Government characterized the court-ordered enforcement of an unprecleared election statute as "legislative" change. Br. for Petitioner at 6, *Hathorn*; Br. for U.S. at 11, 17–18 & nn.15–16, *Hathorn*. (When this Court said in *Hathorn* that §5 required preclearance of the "'policy choices of the elected representatives of the people,'" it was referring to the Mississippi *Legislature's* policy choices, not the Mississippi Supreme Court's. 457 U.S. at 265 n.16 (citation omitted).)

There is one final point: The appellees and the Government both quote the statement in *Branch*—as if it resolved this case—that §5 requires preclearance of "*all* voting changes" and "includes voting changes mandated by order of a state court." 538 U.S. at 262. That language, though, doesn't answer the question presented here, but rather invites it. We do not dispute that *when* a state-court order can fairly be deemed a §5 "change," it requires preclearance. The question here, however, is antecedent: *Can* the particular state-court decisions at

issue in this case fairly be deemed §5 "changes"? On that question, *Branch* and its predecessor *Hathorn*, which dealt with very different kinds of state-court orders, have no bearing.

b. *Perkins* and *Lockhart*. Both *Perkins v. Matthews*, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), addressed the question whether an invalid state practice actually "in ... effect" *on the statutory coverage date* establishes a §5 baseline, and not the textually and analytically different question whether a practice precleared *after the coverage date* remains frozen in place even after a state court has voided it on constitutional grounds. Unable or unwilling to come to grips with that distinction, the appellees simply ignore it. Their quotation from *Perkins* omits the words "on November 1, 1964" from the critical passage, and their quotation from *Lockhart* uses an ellipsis to cover over the words "on November 1, 1972." Red Br. 50.

As we have explained (Blue Br. 41), limiting *Perkins* and *Lockhart* to coverage-date baselines makes textual sense. It follows not only from the words "on November 1, 1964," but also from §5's savings clause, which states that preclearance will not protect a statute against a "subsequent action to enjoin enforcement," including, according to DOJ's own interpretation, an action based on "any applicable provision of state ... law." *See supra* at 7. That clause—which by its terms applies *only* to the post-1964 preclearance regime and not to the pre-1964 coverage-date regime—authorizes state-court decisions (like *Stokes* here) invalidating previously-precleared statutes (like Act No. 85-237) on state-law grounds. Extending *Perkins* and *Lockhart* beyond coverage-date

baselines, and reading them to justify ignoring a state court's judgment that a precleared statute violates the state constitution, would unjustifiably circumscribe the savings clause's field of operation.

The appellees likewise have not met our argument that limiting *Perkins* and *Lockhart* to coverage-date baselines makes historical sense. In the years immediately surrounding §5's enactment, Congress was facing a "constantly moving" target (Blue Br. 42) as a result of States' intentional manipulation of voting laws. As the appellant in *Perkins* explained the problem, in that era "[s]udden adherence to previously ignored laws [was] a familiar discriminatory device." Br. for Appellants at 18 n.9, *Perkins*. But the historical warrant for ignoring state law no longer exists. Despite the appellees' speculation, there is no indication that, today, baselines are being "manipulated to discriminatory effect." Red Br. 50 n.25. That is particularly true when, as here, a practice's invalidity under state law has been authoritatively adjudicated by a State's highest court, thus eliminating the risk of gamesmanship.

C. The District Court's Interpretation Impermissibly Exacerbates Federalism Costs.

Seeking to avoid the rule that §5 should be interpreted so as not to "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts," *Bossier Parish*, 528 U.S. at 336, the appellees insist that the district court's interpretation does not "pose any federalism problem" that does not arise in the typical §5 case. Red Br. 51. We disagree.

1. *Nullification of state-court judgments.* This Court's §5 decisions have never sanctioned the "federal-

ism-and-separation-of-powers double-whammy" (Blue Br. 23) that the district court's decision here entails—in which a state court's exercise of judicial review is subject to the veto of a federal executive-branch official. That sort of intrusion has been altogether absent from the mine run of §5 cases, which have asked only whether DOJ can block an ordinary "policy choice" embodied in a state legislative or administrative rule. The district court's interpretation—which would for the first time permit a state court's truly judicial "judgments ... [to be] revised and controuled ... by an officer in the executive department," *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.* (1792)—would represent a quantum expansion of §5's scope.

The appellees have offered no response at all to this point, and the Government's answer exalts form over substance. The district court's interpretation, the Government asserts, doesn't *technically* "subject[] state supreme courts to the 'insult' of having their 'authoritative determinations of state law' reviewed by employees of the federal executive branch" because DOJ doesn't *technically* "review the [state] court's interpretation of state law for correctness." U.S Br. 25. Even if the distinction the Government posits made sense on some theoretical level, it matters none in practice. Regardless of the reason DOJ gave here, the real-world effect of its review was to nullify the Alabama Supreme Court's decision in *Stokes*. The court there had held that Act No. 85-237 violated a race-neutral provision of the Alabama Constitution and was thus void; DOJ, by contrast, decreed that Act No. 85-237 "remain[ed] in full force and effect." M.D.A. App. 5a, 12a. Accordingly, despite having been binding state law for nearly 20 years, the Alabama Supreme Court's judgment in *Stokes* is no longer worth the

paper it is printed on. The well-settled doubts about an executive official's authority to countermand a federal-court judgment ought to apply doubly when a state-court judgment is at issue.

2. *Commandeering.* The appellees and the Government seek to avoid the anti-commandeering doctrine by recasting this as a straightforward preemption case—one in which a federal statute merely "'regulate[s] state activities,' rather than 'seek[s] to control or influence the manner in which States regulate private parties.'" *Reno v. Condon*, 528 U.S. 141, 150 (2000) (citation omitted). But the district court did not interpret §5 as setting a substantive *federal* standard requiring special elections. Instead, the district court interpreted §5 as requiring States to maintain and enforce *state* election practices that their own constitutions forbid. This Court has "always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States*, 505 U.S. 144, 166 (1992).

The appellees' response misses the point. The fact that a State may be forced to maintain a practice "that it would prefer to change" is, they say, "the very essence of Section 5, an essence that this Court has repeatedly reaffirmed." Red Br. 54. But this is not a case about States being made to select among a range of permissible policy "prefer[ences]." This is a case about States being made to act in ways that violate their own organic law. As we have already explained, it is one thing for §5 to require a State (as it often does) to keep in place a law "that it *does not want to have*." Blue Br. 47. It would be quite another thing if §5 were broadened to force a State "to

keep a law that the ultimate arbiter of state law has definitively determined it *cannot constitutionally have*." *Id.* The district court's interpretation, which the appellees have conceded has that effect (Red Br. 51; M.D.A. 10, 21, 23), turns up the commandeering volume substantially.

3. *Congruence and proportionality.* This Court's §5 decisions have never steered the statute into contexts in which the record before Congress established no particularized need for federal intervention—and thus into areas in which §5, as applied, might not be congruent and proportional under *City of Boerne v. Flores*, 521 U.S. 507 (1997). The appellees' anecdotal references to the discriminatory conduct of several state-court judges in the lead-up up to the Voting Rights Act's passage do not pass *Boerne* muster. As we have shown, the several episodes the appellees now cite (disgraceful though they were) are not relevant to the question actually presented in this case. *See supra* at 9-11. And, in any event, no fair reading of the legislative record could justify the inference that Congress actually grounded §5 on those episodes. *Id.* Given the absence of record evidence that state courts' exercises of judicial review, specifically, posed a serious threat to voting rights, an interpretation that stretched §5 so far would raise doubts about its as-applied constitutionality.

There is no merit to the suggestion that clear-statement and constitutional-avoidance arguments are off-limits here on the ground that the "District Court for the District of Columbia has exclusive jurisdiction over challenges to the constitutionality of Section 5." U.S. Br. 24 n.2. This case presents no such challenge, and nothing in the Voting Rights Act precludes this Court from

considering, in determining what §5 means, well-established interpretive doctrines.

D. The District Court's Interpretation Is Unworkable and Unnecessary.

1. In an attempt to argue that this case is simply §5 business as usual, the Government has pointed to evidence that certain state-court orders have, in practice, been submitted for preclearance under §5. Overwhelmingly, however, the sorts of orders to which the Government points are administrative and quasi-legislative court decrees that are well beyond the scope of the question presented here. In particular, the Government refers to state-court orders prescribing the form and content of voter-registration forms, approving annexations, formulating redistricting plans, and setting election schedules. U.S. Br. 29–30. If we were actually arguing here that §5 should be read to entail a categorical exemption for *all* state-court orders, the Government's laundry list might pack a punch. But we aren't, and so it doesn't.

A bit closer to the point, the Government cites two §5 submissions concerning "court decision[s] interpreting state law." *Id.* at 31. But those two submissions cannot overcome the fact that there have surely been scores of such decisions handed down during the last 40+ years that have *not* been submitted for federal approval. (And with good reason; there has been no basis for believing that they *needed* federal approval.) At the end of the day, the point remains that a decision by this Court subjecting state courts' ordinary exercises of judicial review to preclearance would open up a new universe of §5 liti-

gation and would dramatically increase the burdens on covered jurisdictions. *See* States Br. 12–19.

2. Nor have the appellees or their amici shown that there is a need for the district court's novel interpretation in light of the "panoply of established remedies for enjoining discriminatory voting practices." Blue Br. 50. The hypotheticals spun by the ACLU prove our point. It claims that our position would allow covered jurisdictions to "revert" to "discriminatory ... system[s] of elections"—and, indeed, to "segregated polling places"—"free and clear of Section 5." ACLU Br. 18. The conclusive rejoinder is that such practices would be immediately remedied under either §2 of the Voting Rights Act, the Fourteenth Amendment, or the Fifteenth Amendment. There is simply nothing to the appellees' assertion that our position would somehow "'open[] a loophole in the statute the size of a mountain.'" Red Br. 42.

III. *Young v. Fordice* Provides an Alternative Basis for Reversal.

In our opening brief, we urged, as a stand-alone basis for reversal, that even if decisions like *Stokes* and *Riley* could sometimes be deemed §5 changes, *Stokes* and *Riley* themselves cannot be. The reason, we explained, is that under this Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997), Act No. 85-237 was never "in force or effect" because the Alabama Supreme Court voided it at the earliest possible juncture. Blue Br. 51–56. In a conclusory response, the appellees continue to seek to avoid *Young* on grounds that we have already shown do not give rise to valid distinctions—*e.g.*, that the voter-registration plan there "had not been actually enacted into law." Red Br. 51.

The Government's answer on *Young* actually makes our case. The Government *admits* that it would be inappropriate to "us[e] a procedure as a relevant baseline for measuring retrogression if that procedure were so obviously unconstitutional that it was immediately enjoined and never went into effect." U.S. Br. 23–24. This case is different, the Government says, because Act No. 85-237 was "approved by a trial court and put into effect by an election." *Id.* at 24. The Government concedes, in other words, that if the trial court in *Stokes* had invalidated Act No. 85-237 and enjoined the 1987 special election—as we now know it should have—the 1985 act would "not constitute a baseline under *Young*." *Id.* But because the trial court erroneously allowed the election to proceed, the argument goes, the 1985 act was frozen in place as a §5 baseline, and the Alabama Supreme Court's correction of the trial court's error constituted a §5 "change." That peculiar view, though, would invert the state-court hierarchy and make the trial court, rather than the Alabama Supreme Court, the ultimate arbiter of state law. *Compare* Ala. Const. Art. VI, §140(a) ("The supreme court shall be the highest court of the state ...."). Surely §5 doesn't require that.

CONCLUSION

This Court should take jurisdiction and reverse the district court's decision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Bob Riley, Governor of Alabama,

Appellant,

v.

Yvonne Kennedy, et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because appellant's notice of appeal was untimely filed.

2. Whether a covered jurisdiction must seek preclearance under the Voting Rights Act before abandoning an already precleared and actually administered voting practice that a state court declares invalid under the state constitution.

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JURISDICTION

This Court's jurisdiction to hear appeals from cases arising under Section 5 of the Voting Rights Act is set forth in the statute itself. 42 U.S.C. § 1973c(a) ("Any action under this section shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court.").[1] The time limits for appeals are set by 28 U.S.C. § 2101(b), which states in pertinent part that appeals "shall be taken within thirty days from the judgment, order, or decree, appealed from, if interlocutory, and within sixty days if final."

The three-judge court entered final judgment in favor of appellees on August 18, 2006. J.S. App. 9a-10a; J.A. 3-4. Governor Riley filed his appeal seeking review of that judgment on May 18, 2007, after the district court issued an order awarding appellees postjudgment relief. J.A. 7. As explained below, this Court lacks jurisdiction to consider Governor Riley's appeal of the August 18, 2006, final judgment.

INTRODUCTION

This case arises out of Alabama Governor Bob Riley's decision to fill a vacant seat on the Mobile County Commission by gubernatorial appointment rather than by special election without first obtaining

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[1] During the course of this litigation, Section 5 was extended and amended in ways that do not alter its application here. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580.

preclearance under Section 5 of the Voting Rights Act of 1965. The Governor claims that he is excused from complying with Section 5 because his decision received the imprimatur of the Alabama Supreme Court, which held that the statute providing for special elections, although it had been precleared and actually administered in 1987, failed to comply with a state constitutional provision governing local legislation. The three-judge court properly rejected the Governor's assertion. This Court's decisions and the applicable Department of Justice regulations have consistently required that covered jurisdictions obtain preclearance of changes from election to appointment, and that covered jurisdictions seek preclearance of all changes that reflect the covered jurisdiction's policy choices, however generated. The involvement of the Alabama Supreme Court in the Governor's decision is therefore irrelevant to whether Alabama must obtain preclearance.

STATEMENT

I. The History of Section 5 and Voting Rights in Alabama

1. Section 5 of the Voting Rights Act forbids covered jurisdictions such as Alabama from "enact[ing] or seek[ing] to administer" a change to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless they first obtain preclearance from either the U.S. District Court for the District of Columbia or the Attorney General of the United

States. 42 U.S.C. 1973c(a).[2] To obtain either form of preclearance, a jurisdiction must show that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *Id.*;[3] 28 C.F.R. § 51.52(a).

In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), this Court held that Section 5 covers changes from election to appointment, finding that such changes can affect "[t]he power of a citizen's vote." *Id.* at 569. It noted that "[s]uch a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny." *Id.* at 570. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502 (1992), reaffirmed that changes from election to appointment are one of four paradigmatic "typologies" that require preclearance.

Allen further held that citizens whose rights are affected by an unprecleared change can bring a coverage lawsuit before a local three-judge district court, with appeal to this Court. 393 U.S. at 554-55, 560. In a coverage lawsuit, the sole questions are whether a change is covered by Section 5 and, if such

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[2] Obtaining a declaratory judgment from the U.S. District Court for the District of Columbia is the default preclearance procedure under Section 5. "The provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969).

[3] Prior to 2006, the language read "does not have the purpose and will not have the effect of denying or abridging the right to vote" on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c (2000).

a change has not been precleared, what remedy is appropriate. *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). The coverage court does not decide whether a change has a discriminatory purpose or effect; Section 5 reserves that inquiry for the U.S. District Court for the District of Columbia or for the Attorney General. *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978); *Allen*, 393 U.S. at 555-56, 558-59.

2. Congress enacted Section 5's preclearance requirement in response to the long history of racially discriminatory changes in covered jurisdictions' election practices. For a century prior to passage of the Voting Rights Act, minority voters seeking to enforce their rights under the Fourteenth and Fifteenth Amendments had fought recalcitrant state and local governments with litigation that was costly, time-consuming, and piecemeal. Even when victorious, their lawsuits often produced only ephemeral improvement, as jurisdictions sought "new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods." H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441; *see also* S. Rep. No. 97-417, p. 10 (1982); H.R. Rep. No. 109-478, p. 21 (2006) (describing how covered jurisdictions have continued to adopt new discriminatory practices and procedures when existing ones have been eliminated).

The State of Alabama was the source of many of the discriminatory circumventions Section 5 was intended to reach. *See* Brian K. Landsberg, Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act (2007) (describing how litigation in

Alabama contributed to particular provisions of the Act). The Alabama Supreme Court directly participated in one of the most notorious of these examples. Two years after this Court had struck down the white primary in *Smith v. Allwright*, 321 U.S. 649 (1944), Alabama enacted a literacy provision known as the Boswell Amendment. On the basis of a challenge brought by ten black citizens from Mobile, a federal court declared the amendment unconstitutional. *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three-judge court), *aff'd*, 336 U.S. 933 (1949). The court found that the amendment's "main object was to restrict voting on a basis of race or color" and that it had "been arbitrarily used for the purpose of excluding Negro applicants for the franchise." *Id.* at 880.

Alabama responded to *Davis* by enacting another constitutional amendment: it retained a literacy test and delegated its content to the Alabama Supreme Court. *See United States v. Atkins*, 323 F.2d 733, 735 (5th Cir. 1963). That court responded by crafting a complicated application with difficult and sometimes unanswerable questions, as well as a supporting witness requirement. *See United States v. Penton*, 212 F. Supp. 193, 205-08 (M.D. Ala. 1962) (reprinting the test).

The Alabama Supreme Court updated the test to ensure it served its disenfranchising purpose. In 1960, after civil rights organizations began teaching applicants how to complete the form, questions were rearranged in twenty different sequences to place obstacles in the path of less well-educated black applicants. And in 1964, after several federal court decisions finding that the original test was being

administered discriminatorily, the court promulgated a new, even more exclusionary form. *See United States v. Parker*, 236 F. Supp. 511, 515 (M.D. Ala. 1964) (finding that the new test's civic knowledge section "consists of qualifications different from and more stringent than those used in registering white persons" in prior years). Both committee reports accompanying the Voting Rights Act condemned the Alabama Supreme Court's test. *See* H.R. Rep. No. 89-439, *supra*, at 2444 ("The inescapable conclusion is that these tests were not conceived as and are not designed to be bona fide qualifications in any sense, but are intended to deprive Negroes of the right to vote."); S. Rep. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2546 (describing the Alabama test as "an additional barrier to Negro registration"). Alabama abandoned the test only after the Voting Rights Act was upheld. *See* Landsberg at 196 n.53.

Like the Alabama Supreme Court, Alabama's lower courts actively participated in the disenfranchisement of black citizens. For example, then-Circuit Judge George Wallace, who later served as governor during the State's resistance to federal desegregation decrees, impounded the voter registration records of Barbour and Bullock counties in an effort to impede an investigation by the United States Commission on Civil Rights. Judge Wallace stated in response to a Commission subpoena that "[t]hey are not going to get the records. And if any agent of the Civil Rights Commission comes down here to get them, they will be locked up." Report of the U.S. Commission on Civil Rights 71 (1959).

After passage of the Voting Rights Act, Alabama state court judges continued to resist black political

participation. Several Circuit Court judges enjoined county probate judges—who were responsible for maintaining voter registration rolls—from placing on the official lists the names of citizens found qualified to vote by federal examiners appointed under Section 4 of the Act. Faced with the conflict between federal law and state court orders, the county officials "themselves invoked the jurisdiction" of the federal courts, "offer[ing] to do equity and . . . show[ing] no spirit of recalcitrance." *Reynolds v. Katzenbach*, 248 F. Supp. 593, 594 (S.D. Ala. 1965) (three-judge court). The federal court declared the state court injunctions "void, null and of no effect." *Id.*

3. Since its enactment, Section 5 has played an essential role in protecting the right to vote in Alabama. *See generally* Peyton McCrary et al., *Alabama*, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990, at 38, 47-48, 56 (Chandler Davidson & Bernard Grofman, eds. 1990) (describing the Act's role in increasing black political participation). Section 5's major contribution has been to deter covered jurisdictions from even attempting to make changes that will have a discriminatory purpose or effect. H.R. Rep. No. 109-478, p. 24 (2006). Even so, between 1982 and 2006, the Department of Justice objected to 46 of Alabama's Section 5 submissions. *See* The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005, Map 5A (2006). During this period, Alabama and its jurisdictions also withdrew or otherwise modified 88 proposed voting changes after the Department requested more information during the preclearance process. Luis Fraga & Maria Ocampo, *More Information Requests and the*

Deterrent Effect of Section 5 of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power 47, 61 tbl.3.3 (Ana Henderson, ed. 2007). Finally, during this period, the Department and private plaintiffs brought 22 successful coverage actions against unprecleared changes.

II. Alabama's Tradition of Local Laws, the Mobile County Commission, and Acts 85-237 and 2004-455

1. County commissions govern each of Alabama's sixty-seven counties. Historically, the composition and selection of these commissions have been determined by a combination of general and local laws. The general law appears in Chapter 3 of Title 11 of the Code of Alabama. Section 11-3-1(c) provides, *inter alia*, for commissions composed of four commissioners to be elected at large and the judge of probate, who serves as chairman. Until September 1, 2007, section 11-3-6 served as the general law governing the filling of vacancies on county commissions; it provided that such vacancies would be filled by gubernatorial appointment.[4]

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[4] Until 2004, the section stated that "in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed." Ala. Code § 11-3-6 (1975). As noted below, Act 2004-455 amended § 11-3-6 to authorize local laws to provide for the manner of filling vacancies. J.A. 118. Section 11-3-6 was repealed by Act 2007-488, § 2, and Ala. Code § 11-3-1 now addresses the filling of vacancies. Section 11-3-1(b) allows local law to dictate whether vacancies should be filled by special election or gubernatorial

Despite these general provisions, Alabama's legislature has shown a preference for local laws, and the state's history is honeycombed with laws prescribing variations from the State's general law.[5] The practice of local legislation deviating from general laws stretches back at least a century and has long been intertwined with the state's racialized politics. For example, when "the white-supremacist Democratic party" regained control of Alabama at the end of Reconstruction, "the state legislature passed a series of local laws that eliminated elections for county commission and instead gave the governor the power to appoint the commissioners. This system of gubernatorial appointment was particularly favored in black belt counties threatened with black voting majorities." *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1358 (M.D. Ala. 1986).

In more recent years, local laws have often been more salutary. For example, local laws have provided for districted elections in jurisdictions with significant, geographically concentrated black populations that had been unable to elect representatives of their choice under the default at-large system.[6] While Mobile County adopted districts as the result of a federal court decree, *see infra* at 11-

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appointment. Section 11-3-1(f) makes the validation of local laws retroactive.

[5] *See* Pl.'s Trial Br., Exhibit E, Doc. No. 21-2, *Plump v. Riley*, 2008 U.S. Dist. LEXIS 4408, *amended*, 2008 U.S. Dist. LEXIS 5635 (M.D. Ala. 2008) (three-judge court) (detailing, by county and in chronological order, the hundreds of local acts passed in Alabama since 1866 regarding selection of county commissioners).

[6] *See* Exhibit E, *supra* note 5 (listing examples).

12, the local legislation at issue in this case enables voters there to be represented by a commissioner of their choice when a vacancy arises. Scores of local laws have been used, and continue to be used, throughout Alabama.

2. Mobile County is located in the southwestern corner of Alabama. Its estimated population in 2005 was 401,427, of whom 34.5 percent were black. J.A. 105. In Mobile County Commission District 1, there are 75,087 registered voters, of whom 62% are black. *Id.* at 23.

Until 1901, Mobile County's governing body was elected from single-member districts. *Brown v. Moore*, No. 75-298-P, slip op. at 6 (S.D. Ala. Mar. 2, 1977). That year, at the height of a "movement that swept the post-Reconstruction South to disenfranchise blacks," *Hunter v. Underwood*, 471 U.S. 222, 229 (1985),[7] the state legislature authorized at-large elections for five commissioners. In 1957, during the same legislative session that enacted the local law containing the notorious Tuskegee gerrymander, *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960), Alabama enacted another local law that

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[7] In *Hunter*, this Court described the Alabama Constitutional Convention of 1901 as part of that movement, noting that the "zeal for white supremacy ran rampant":

> The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address:
>
> > "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."

471 U.S. at 229 (quoting the official Convention proceedings).

reduced the size of the Mobile commission to three full-time members, still elected at-large but with the use of numbered places. *Brown*, slip op. at 6.

Following passage of the Voting Rights Act, black citizens in Mobile County brought suit in federal court challenging the County's at-large election scheme. In a decision from which the county did not appeal, the district court held that the use of at-large elections unconstitutionally diluted black voting strength. *Id.* at 39. It found that "discriminatory intent was present when the 1901 legislature changed from single-member districts to at-large elections." *Id.* at 20. Moreover, the court found that the state's refusal to adopt single-member districts after 1965 reflected racially discriminatory "intentional state legislative *inaction*," *id.* at 28 (emphasis in original), in that "concern . . . around how many, if any, blacks would be elected . . . prevented any effective redistricting which would result in any benefit to the black voters," *id.* at 27. In light of these findings, the court ordered the creation of three single-member districts to replace the at-large configuration. The court-ordered plan, which was supported by both parties, created one majority-black district. *Id.*, App. A at 1-3.

Once black voters in Mobile County could elect a representative of their choice to the Commission, the question of how vacancies should be filled took on new salience. In 1985, under the sponsorship of an African-American state senator from Mobile who represented a majority-black single-member district, the legislature passed Act 85-237 to ensure that any vacancies on the commission would be filled by special election and not by gubernatorial

appointment. The Department of Justice precleared the Act and it went into effect on June 17, 1985. J.A. 20.

The first vacancy arose in 1987, in the majority-black district. A voter sought to block the operation of Act 85-237 by filing suit in state court, claiming that the act's use of special elections violated the state constitution. The circuit court rejected the challenge and the election went forward, resulting in the election of Sam Jones. J.A. 27.

3. Subsequently, a divided Alabama Supreme Court interpreted article IV, § 105 of the state constitution to preclude the use of Act 85-237 given the existence of "general law" governing the filling of vacancies on county commissions.[8] *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988); J.S. App. 17a. *Stokes* relied on a prior decision, *Peddycoart v. City of*

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[8] Section 105 states that "No special, private, or local law ... shall be enacted in any case which is provided by a general law." J.S. App. 18a. Contrary to the Governor's suggestion, see Brief for Appellant ("Riley Br.") at 2, the preference for general law in section 105 was not "race-neutral." *See Knight v. Alabama*, 458 F. Supp. 2d 1273, 1284-85 (N.D. Ala. 2004) (finding that the "general hostility to home rule in the 1901 Constitution ... was motivated at least in part by race" in that white control at the state level served as "an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties") (internal quotation marks omitted), *aff'd*, 476 F.3d 1219 (11th Cir.), *cert. denied*, 127 S.Ct. 3014 (2007). *See generally Hunter*, 471 U.S. at 228-29 (describing the purposes of the 1901 constitutional convention).

As far as appellees can tell, the Alabama Supreme Court did not strike down a local law regulating county commissions for violating the anti-local law aspect of § 105 until Act 85-237 allowed a majority-black district to fill vacancies through special elections.

Birmingham, 354 So. 2d 808 (Ala. 1978), that had explicitly adopted a new interpretation of section 105, to be applied prospectively.[9] As a result, although the local law creating a three-member county commission for Mobile (rather than the five-member commission in the general law) remained constitutional, the local law providing for special elections did not. *See Stokes*, J.S. App. 21a-23a (Steagall, J., dissenting) (arguing that because the 1985 law had taken the form of an amendment to the 1957 local law, it should continue in force despite *Peddycoart*).

Faced with the opinion in *Stokes*, then-Governor Guy Hunt decided to return to the pre-1985 practice of gubernatorial appointment. He did not seek preclearance of his decision. J.S. App. 4a. But he nevertheless respected the will of the voters in Commission District 1, by using his asserted appointment power to select Sam Jones, the winner of the special election. *Id.* Thus, Mobile County voters had no practical reason to challenge his action under Section 5. Despite the decision in *Stokes*, the Alabama legislature did not repeal, and counties did not cease to use, myriad other election-related local laws passed before or after *Peddycoart*.

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[9] In *Peddycoart*, a case about municipal tort liability, the court held that future local acts would be "subject to all of the constitutional qualifications." 354 So. 2d at 814. By contrast, for already-enacted laws, the court announced that it would continue to "apply the rules which it has heretofore applied in similar cases," *id.*: local acts would be invalidated by general acts on the same subject only if the legislature had clearly indicated such an intention.

4. In 2004, the Alabama state legislature passed, and the Governor signed into law, a statute to remove the obstacle identified by *Stokes*. Act 2004-455 provided that vacancies on county commissions were to be filled by gubernatorial appointment "[u]nless a local law authorizes a special election." Ala. Code. § 11-3-6 (Supp. 2004); J.A. 116. Alabama obtained administrative preclearance for Act 2004-455. J.A. 21.[10]

In September 2005, Sam Jones—who had held his seat on the Commission since the special election of 1987—was elected Mayor of the City of Mobile. As a result, he vacated his seat on the Commission on October 3, 2005. J.A. 21-22.

Despite uncertainty over whether Act 2004-455 in combination with Act 85-237 required a special election to fill the vacancy, *see* Ala. Atty. Gen. Op. No. 2004-215, at 3-4 (interpreting the 2004 Act to overcome the rule announced in *Stokes*), Governor Riley announced his intention to fill the vacancy by appointment. J.S. App. 26a.

Three black voters who were also state legislators from Commission District 1 (and who are also the appellees in this case), brought suit in state court. They asserted that, in light of the 1985 and 2004

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[10] In its preclearance submission, the State said nothing to suggest that Act 2004-455 would permit only subsequently enacted local laws. Rather, it noted the problem presented by *Stokes* and simply stated that the new Act would "allow local law to provide for special elections to fill vacancies in the office of county commissioner." *See* Letter from Troy King, Attorney General, to Chief, Voting Section, Civil Rights Division, Aug. 9, 2004, at 2, ¶(o), *reprinted in* Pl.'s Trial Br., Exhibit F, Doc. No. 21-2, *Plump v. Riley*, *supra* note 5.

statutes, the vacancy was due to be filled by special election. The Circuit Court of Montgomery County agreed and ordered that a special election be held.[11]

Governor Riley appealed. J.A. 22. On appeal, the Alabama Supreme Court held that Act 2004-455 operated only prospectively and did not authorize local laws enacted prior to 2004. Thus, it held that the 2004 Act did not provide for special elections under Act 85-237. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005); J.S. App. 25a.

5. In light of this decision, on November 15, 2005, the Governor proceeded with his plan, and appointed Juan Chastang to fill the Commission vacancy. J.A. 23. He did not seek preclearance of his decision to use gubernatorial appointment. J.S. App. 5a.[12]

III. The Current Lawsuit

1. In response to Governor Riley's appointment of Chastang, appellees filed this Section 5 coverage

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[11] Acting pursuant to the Circuit Court's order, local election officials requested that the Department of Justice preclear an election schedule, which the Department did. J.A. 22.

[12] This is the last time gubernatorial appointment will be used to fill a vacancy on the Mobile County Commission. In 2006, the legislature once again provided that vacancies on the Commission should be filled by special election. *See* Ala. Act 2006-342; Mot. to Dis. or Affirm (M.D.A.) App. 1a. That Act conforms to the guidelines in *Riley* and the Department concluded it did not need to be precleared because it made no changes in the existing law. Moreover, in 2007, the Alabama legislature passed, and the Governor signed into law, yet another statute governing vacancies on county commissions that permits local laws providing for special elections. *See supra* note 4.

lawsuit in the U.S. District Court for the Middle District of Alabama on November 16, 2005. Appellees sued only Governor Riley and sought a declaratory judgment that the Governor "lack[ed] the power to appoint a person to fill a vacancy on the Mobile County Commission unless and until the defendant obtains preclearance, as required by Section 5 of the Voting Rights Act." J.A. 11. Appellees also asked for an injunction to prevent the Governor from delivering appointment papers or acting in any way to fill the vacancy by appointment. *Id.* Appellees further requested "such other relief as the premises may require," J.A. 12, as well as an award of costs and reasonable attorneys' fees. *Id.*

2. After a full hearing, a three-judge district court entered judgment for appellees, concluding that the change from special election to gubernatorial appointment was covered by Section 5. J.S. App. 3a-8a. The court followed the three-step inquiry laid out by this Court in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), which directs courts facing Section 5 coverage lawsuits to determine "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." Because the second of those issues was undisputed—the Governor admitted that he had not obtained preclearance, *see* J.A. 23—the court addressed only whether there was a covered change and, if so, what remedy was appropriate.

In answering the first question, the court "compar[ed] the new challenged practice with the baseline practice, that is, the most recent practice

that is both precleared and in force or effect." J.S. App. 6a-7a (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997), and *Gresham v. Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga. 1988) (three-judge court), *aff'd sub nom. Poole v. Gresham*, 495 U.S. 954 (1990)). The court reasoned that, "[b]ecause Act No. 85-237 was the most recent precleared practice put into force and effect with the election of [Sam] Jones in 1987, it is the baseline against which we must determine if there was a change." J.S. App. 7a. It rejected Governor Riley's argument that Act 85-237 could not be the baseline because the act had later been declared unconstitutional on state-law grounds, noting that courts are "required to determine the baseline 'without regard for [its] legality under state law.'" *Id.* (quoting *Lockhart*, 460 U.S. at 133).

The court therefore held that, because the practice of gubernatorial appointment was different from the baseline, appointment marked a change that should have been precleared before it was implemented. J.S. App. 7a-8a. The court emphasized that it was "in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in [*Stokes v. Noonan* and *Riley v. Kennedy*], or that the governors acted in accordance with state law in making the appointments." *Id.* at 8a. Rather, it merely held that Section 5 requires state officials to obtain preclearance before implementing the change in state practice brought about by those decisions.

Having determined there was an unprecleared covered change, the court turned to determining the appropriate remedy. Because Governor Riley had already appointed Chastang to the Commission, an

injunction vacating his appointment would prove unduly disruptive if preclearance were easily obtainable. Accordingly, appellees had urged the district court to follow this Court's guidance in *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971), and "enter an order affording local officials an opportunity to seek federal approval." *See* Pl.'s Trial Br. at 7-8, Doc. No. 15 (Jan. 20, 2006). The court agreed, and therefore allowed the State 90 days to obtain preclearance, after which time it announced the possibility that it might "revisit" the issue of remedy. J.S. App. 9a.

The court entered judgment in favor of appellees on August 18, 2006, and directed the clerk "to enter [the judgment] on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure." J.S. App. 9a-10a. The court also ordered that costs be taxed against Governor Riley. *Id.* at 10a.

3. In light of the district court's judgment, the Governor could have appealed to this Court or filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment preclearing his use of gubernatorial appointment. *See* 42 U.S.C. § 1973c(a). Instead, the State decided to seek administrative preclearance, and it filed a submission with the Attorney General on November 9, 2006.

4. The Attorney General timely denied the State's request for preclearance on January 8, 2007. M.D.A. App. 2a-8a. Acting pursuant to his delegated

authority,[13] Assistant Attorney General Wan J. Kim determined that the State had "failed to carry its burden of proof that the change is not retrogressive." *Id.* at 6a-7a. Citing the particular circumstances of Mobile County, including its adoption of single-member districts as a remedy for unconstitutional vote dilution in *Brown*, the Department determined that "[t]he transfer of electoral power effected by [the return to gubernatorial appointment] appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission." *Id.* at 6a.

In making that determination, the Department necessarily rejected the Governor's argument that the return to gubernatorial appointment was not covered by Section 5.[14] The Department found that special election under Act 85-237 was the last precleared practice in force or effect, thus making it the last legally enforceable procedure under Section 5 and the benchmark against which changes were to be measured. M.D.A. App. 4a-5a. Because changes brought about by state court decisions are not exempt from Section 5, the Department concluded that the return to gubernatorial appointment was unenforceable. *Id.*

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[13] The Attorney General has delegated his authority to make preclearance decisions to the Assistant Attorney General, Civil Rights Division. 28 C.F.R. § 51.3.

[14] Had the Department agreed with Governor Riley's view, its regulations would have required it to return the submission "as promptly as possible" with an explanation as to why the change was not covered, making no response on the merits of the change. *See* 28 C.F.R. § 51.35.

5. Pursuant to Department regulations, the state sought reconsideration of the Department's objection. Due to the further delay this would occasion, in January 2007, five months after the district court had entered its final judgment, appellees filed a motion for further relief, asking the three-judge court to vacate Chastang's appointment and order a special election. *See* Pl.'s Motion for Further Relief, Doc. No. 35 (Jan. 10, 2007); J.A. 5. The district court denied that motion. *Id.* at 5-6.

6. The Justice Department reaffirmed its objection on March 12, 2007. M.D.A. App. 9a-19a. It noted that the State's request for reconsideration "contain[ed] no new factual information that impacts the retrogression inquiry," *id.* at 10a, and contained no new arguments which had not been addressed by either the three-judge district court, the January 8 objection letter, or both. *Id.* at 11a. Rejecting the State's argument that Act 85-237 was never in force or effect because it was later held invalid in *Stokes*, the Department found the conduct of the 1987 special election dispositive. "Indeed, no other steps could have been taken than were in fact taken to put the election method into force or effect." M.D.A. App. 13a. Citing this Court's opinion in *Branch v. Smith*, 538 U.S. 254, 262 (2003), the Department rejected the State's argument that the state courts' involvement changed the preclearance inquiry: "It is uncontroverted that a Section 5 change may be brought about by seeking to implement state court decisions." M.D.A. App. 14a. The Department further explained that its rejection was not based on any blanket policy against preclearing changes from elections to appointments; it had recently precleared such a change for an Alabama judgeship. *Id.* at 16a.

7. In light of the Justice Department's objection, and the fact that Chastang nonetheless remained in office, on March 13, 2007, appellees filed a motion asking the district court to order a special election. After full briefing, on May 1, 2007, the three-judge court vacated Chastang's appointment. J.S. App. 1a-2a. Governor Riley asked the court to stay its remedial order; the court denied his motion on May 17. J.A. 7. The following day, Governor Riley filed a notice of appeal to this Court. He did not seek a stay of the district court's remedial order from this Court.

Accordingly, Alabama conducted a special election on October 9, 2007, to fill the vacancy initially filled by Chastang. In that election, Chastang was defeated by Merceria Ludgood, who won nearly 80% of the vote.[15]

8. On November 20, 2007, this Court postponed jurisdiction to a hearing of the case on the merits. 128 S.Ct. 645.

SUMMARY OF ARGUMENT

I. Section 5 of the Voting Rights Act requires preclearance of the change in the method of filling vacancies on the Mobile County Commission from special election to gubernatorial appointment. Governor Riley contends that this change is exempt from Section 5 because it was made in response to an Alabama Supreme Court decision interpreting the state constitution. But the Governor's proposed

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[15] *See* Certification of Results, Special Election, Mobile County (Oct. 16, 2007), *available at* http://records.mobile-county.net/ViewImagesPDFAll.Aspx?ID=2007081288.

exemption is contrary to the text, logic, and history of Section 5, as well as its interpretation by this Court and the Department of Justice.

Confronted with evidence that jurisdictions such as Alabama were circumventing federal statutory and constitutional guarantees of the right to vote, Congress enacted Section 5 to require preclearance "[w]henever" a covered jurisdiction enacts or seeks to administer "any" change to a "standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c(a). Congress's categorical language was intended to cover *all* such changes, regardless of the covered jurisdiction's reason for "enact[ing] or seek[ing] to administer" them.

Thus, this Court has repeatedly held that changes from election to appointment lie at the core of Section 5. And it has also repeatedly held that the plain language of Section 5 covers changes ordered by state courts. That conclusion is reinforced by the evidence before Congress in 1965 of state judicial participation in the denial of minority voting rights, which makes it inconceivable that Congress somehow created—but did not write into the statute—the exemption the Governor seeks.

Governor Riley's fallback argument that there is "no change" because he seeks to return to the practice in effect when Section 5 went into force in 1964 is also meritless. For three decades, this Court has recognized that when a jurisdiction implements a new, precleared practice or when a federal court imposes a new practice to remedy a violation of federal law, that new practice becomes the baseline against which future changes are measured. The Department of Justice's regulations confirm that

Section 5 covers changes that "return[] to a prior practice or procedure." 28 C.F.R. § 51.12. Both the three-judge court and the Department of Justice thus properly concluded that the Section 5 baseline in this case is the practice of special elections enacted and precleared in 1985 and actually implemented in 1987. The Governor's argument that subsequent state supreme court rulings can erase that baseline, as determined by federal law, inverts the hierarchy of Article VI, § 2, under which federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

II. Although this Court should affirm the judgment of the three-judge court below if it reaches the merits, it lacks jurisdiction over Governor Riley's untimely appeal. The three-judge court issued its final judgment on August 18, 2006, but Governor Riley did not file his appeal until May 18, 2007, far outside the sixty-day jurisdictional time limit for appeals set by 28 U.S.C. § 2101(b). The 2006 judgment was final because it terminated the litigation on the merits, entered judgment in favor of appellees, and ordered precisely the form of relief this Court has commanded in cases where unprecleared changes have already been implemented—namely, allowing a jurisdiction to obtain preclearance for that change. The Governor is simply wrong to contend that the 2006 judgment was interlocutory because the court did not take the drastic step of also vacating his appointment of a commissioner to fill the seat.

The three-judge court's subsequent remedial order in 2007 vacating Governor Riley's appointment after the Department of Justice denied preclearance

did not revive the Governor's opportunity to appeal the court's 2006 coverage ruling. The 2007 order did not change the substance or in any way amend the 2006 judgment, nor was the order necessary to make the court's 2006 coverage ruling final and effective. Governor Riley's theory perversely predicates his ability to appeal on his failure to comply with the court's coverage ruling once preclearance was denied. That theory of jurisdiction is unsound and would have a deleterious effect on courts adjudicating Section 5 cases.

The Court should therefore dismiss the Governor's appeal as untimely, or alternatively, affirm the judgment of the three-judge court below.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER GOVERNOR RILEY'S UNTIMELY APPEAL OF THE DISTRICT COURT'S FINAL JUDGMENT ON THE QUESTION OF SECTION 5 COVERAGE

On August 18, 2006, the three-judge district court entered final judgment for appellees. It held that Section 5 of the Voting Rights Act required Alabama to obtain preclearance before implementing the change from special election to gubernatorial appointment. In light of this holding, it entered an appropriate remedy. Under 28 U.S.C. § 2101(b), Governor Riley had sixty days to appeal from that final judgment. He did not file his notice of appeal until May 18, 2007—a full nine months later. To be sure, this Court has jurisdiction to review the district

court's May 1, 2007, order vacating Chastang's appointment. But the Governor does not seek review of that order.[16] Instead he seeks review of the much earlier final judgment. Because the sixty-day time limit is jurisdictional, and because the finality of the district court's judgment was never suspended by postjudgment proceedings, Governor Riley's appeal is untimely and must be dismissed.

A. The District Court's August 18, 2006, Order Was a Final Judgment

A decision is final for purposes of appeal to this Court "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, Iron Mountain & S. Ry. Co. v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945).[17]

The August 18, 2006, decision did precisely that. As this Court has explained, in a Section 5 coverage lawsuit, the district court is limited to answering three questions: (i) whether the challenged practice constitutes a change covered by Section 5; (ii) whether preclearance procedures were followed; and

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[16] As the Brief *Amicus Curiae* of the Lawyers' Committee for Civil Rights Under Law explains, the Governor may have rendered this case moot on appeal by failing to obtain a stay of the district court's order removing Chastang from his seat.

[17] With respect to questions of finality, this Court has generally interpreted its own jurisdictional statutes harmoniously with those authorizing review by the courts of appeals. *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3909.

(iii) if not, what remedy is appropriate. *Lockhart*, 460 U.S. at 129 n.3. Once the court has decided these three questions, it is entitled to enter a final judgment.

The district court's August 18, 2006, order conclusively resolved each of these three questions. It held that Governor Riley's appointment of Chastang was a change covered by Section 5; that Alabama failed to obtain preclearance for that change; and that the proper remedy was to afford Alabama an opportunity to obtain preclearance. Thus, it properly entered final judgment.

Governor Riley does not dispute that the August 18, 2006, order completely resolved the first two questions in the *Lockhart* inquiry. Riley Br. at 19. Rather, he contends that since the district court allowed him to seek preclearance of the change instead of vacating his appointment of Chastang immediately, it "left the remedy issue open." *Id.*[18]

The Governor is wrong. This Court has instructed that, when a covered change has already been implemented without preclearance, the appropriate remedy is to enter an order "afford[ing] local officials an opportunity to seek federal approval." *Lopez v. Monterey County*, 519 U.S. 9, 21 (1996) (citing *Perkins v. Matthews*, 400 U.S. 379 (1971), and *Berry v. Doles*, 438 U.S. 190 (1978) (per curiam)). In *Berry v. Doles*, this Court was faced

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[18] As a factual matter, Governor Riley's contention that the August 18, 2006, order "disposed of none of [appellees'] prayers for relief" is inaccurate. *See* Riley Br. at 20. The court expressly granted appellees' prayers for declaratory judgment and costs. *See* J.S. App. 9a-10a.

with the question whether Section 5 required a three-judge court to invalidate the results of an election held pursuant to unprecleared changes. The Court concluded that the proper remedy was to

> enter an order allowing [local officials] 30 days within which to apply for approval of the . . . voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for [further relief].

Id. at 192-93. This Court's decision in *Berry* squarely resolved the "remedy" question in that case. *See NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985) (relying on *Berry* to describe the "appropriate remedy"). Therefore, the district court's August 18, 2006, order in this case did not "le[ave] the remedy issue open."

The three-judge court had every reason to treat its August 18, 2006, order as a final disposition. That is why, in addition to entering judgment in favor of appellees, the court awarded costs taxed against Governor Riley and directed that the judgment be docketed as final pursuant to Rule 58. J.S. App. 9a-10a. Indeed, the plain language of the judgment indicates its finality, since the prospect of any further remedy was entirely hypothetical: arising only "*if* the State fail[ed] to comply with" the order to obtain preclearance. *Id.* at 9a (emphasis added). The district court's order cannot be deemed interlocutory merely because postjudgment relief might be required in the hypothetical scenario in which (1) the State failed to either seek or obtain preclearance and (2) the Governor were nonetheless to insist on

keeping Chastang in office. Indeed, the Governor cites no authority for the proposition that the possible existence of hypothetical future eventualities that might raise questions of supplemental relief is enough to prevent entry of a final judgment or to transform an otherwise final judgment into an interlocutory order.

B. The Sixty-Day Limit of § 2101(b) is Jurisdictional and Governor Riley Therefore Cannot Now Appeal the Coverage Ruling

Under 28 U.S.C. § 2101(b), appeals must be taken from final judgments within sixty days. Appeals not taken within this period are jurisdictionally out of time. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 149 & n.24 (1980); *accord* Sup. Ct. R. 18.1 ("The time to file [an appeal] may not be extended."). Governor Riley did not file his notice of appeal within sixty days of the August 18, 2006, judgment, and appellees' postjudgment motion for further relief did not restart the clock on the Governor's appeal. Accordingly, his appeal should be dismissed.

Appellees' postjudgment motion requesting further relief did not suspend the finality of the August 18, 2006, order. It is well established that subsequent remedial orders do not revive the time for appealing an underlying final judgment.[19] "Only

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[19] *See, e.g., Tyler v. City of Manhattan*, 118 F.3d 1400, 1402 n.1 (10th Cir. 1997) ("The fact that the district court may retain jurisdiction over the parties to enforce its judgment does not convert the judgment to an interlocutory order for purposes of appeal."); *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 594

when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew." *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). That did not happen here. The May 1, 2007, remedial order in no way "disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 212. The decision to vacate Chastang's appointment did not change the substance of (or in any way amend) the court's August 18, 2006, coverage ruling. It simply remedied the Governor's refusal to remove Chastang from office once the State failed to obtain preclearance for his appointment.[20]

(9th Cir. 1988) (finding appeal of supervisory remedial order untimely with respect to the underlying judgment); *Inmates of the Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196, 1199 (2d Cir. 1974) (finding underlying judgment "immune from attack" on appeal of a subsequent compliance order), *cert. denied sub nom. Hall v. Inmates of the Suffolk County Jail*, 419 U.S. 977 (1974).

[20] The cases Governor Riley cites do not support his theory of jurisdiction. In *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), this Court held that an order of partial summary judgment on liability alone that the district court itself had characterized as "interlocutory in character," 372 F. Supp. 1146, 1163 (W.D. Pa. 1974), was nonfinal.

Lucas v. Bolivar County, 756 F.2d 1230 (5th Cir. 1985), is also inapposite. *Lucas* involved a proposed redistricting plan for a county board of supervisors that was challenged by voters on various constitutional and statutory grounds. After ordering that changes be made, the district court upheld a revised redistricting plan, issued an order directing the county to

Nor was it reasonable for Governor Riley to have relied on appellees' motion for further relief to somehow revive his right to appeal. Appellees' motion was not even pending before the court until January 10, 2007, nearly three months after the time for appealing the August 18, 2006, judgment had run. *See* J.A. 5. If the Governor had wished to preserve his right to appeal the coverage ruling while seeking preclearance, he could have done so by filing a timely notice of appeal and then requesting from this Court an extension of time to file his jurisdictional statement. Had the Governor obtained the extension authorized by this Court's rules, he would have had ample time to receive a determination on the State's preclearance submission before having to litigate the coverage question in this Court.[21] Therefore, the

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submit the plan for preclearance, and retained jurisdiction for the purpose of scheduling elections under the plan once preclearance was obtained. *See id.* at 1232. The court of appeals held that since the district court would have had to revise the substance of its opinion if the Attorney General denied preclearance, its order approving the redistricting plan could not have been final. *Id.* at 1234. In this case, by contrast, the district court had no need to revisit its decision that preclearance was required after preclearance was denied.

Furthermore, in *Lucas*, the district court retained jurisdiction for the express purpose of issuing future orders that the court of appeals declined to characterize as "purely ministerial," *id.*, namely, devising a series of rules to govern the anticipated election. By contrast, in this case, the court did not announce any intention to issue future substantive orders after August 18, 2006, and indeed would never have had to do so had either preclearance been obtained or the State complied with the Department of Justice's objection.

[21] The Department of Justice must respond to a preclearance submission within sixty days. 42 U.S.C. § 1973c(a); *see* 28 C.F.R. § 51.42. After filing a Notice of Appeal,

Governor's contention that appellees' position makes "bad jurisdictional policy," Riley Br. at 22, gets the argument exactly backward.

C. Permitting Appeals Outside Section 2101(b)'s Sixty-Day Window Would Undermine Efficient and Effective Administration of Section 5

The Governor's theory of jurisdiction would create perverse incentives and waste resources for the parties involved in the Section 5 process. If coverage decisions are not considered "final" until all possible postjudgment injunctive relief is awarded, then appellate review of the coverage question may be delayed for months, even years, while jurisdictions pursue preclearance, first administratively and then judicially. If this Court were to eventually decide that Section 5 did not apply, then the judicial and administrative resources devoted to the preclearance process would have been wasted by the state's decision to hedge its bets by appealing the coverage ruling only after preclearance has been denied. Such delay undermines the effectiveness of Section 5. Requiring timely appeals of coverage rulings

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Governor Riley was entitled to seek a sixty-day extension of time to file his jurisdictional statement. *See* Sup. Ct. R. 18.3. Had he timely appealed from the August 18, 2006, order and received an extension, he would then have had until February 14, 2007, to file his jurisdictional statement, 37 days after the Justice Department denied the State's initial request for preclearance. Had the State filed its initial submission earlier, the Department might have even ruled on the State's reconsideration request by then.

embodied in final judgments by three-judge courts is therefore good policy.

Additionally, the Governor's position would encourage courts that wish to enter final judgments to be more draconian when choosing a remedy for Section 5 violations. Had the district court vacated Chastang's appointment in its August 18, 2006, order, its decision would have been final even under the Governor's approach. But such a remedy would be more disruptive to state policies and would, ironically, exacerbate the very federalism costs the Governor alleges.

Even worse, the Governor's rule would discourage covered jurisdictions from complying with coverage rulings. If the time to appeal a coverage ruling can be revived by a postjudgment remedial order, covered jurisdictions that have otherwise failed to file a timely appeal will have an incentive to restart the clock by continuing to violate Section 5 until the coverage court is impelled to order additional relief. This Court should therefore reject the Governor's interpretation.

II. SECTION 5 REQUIRES PRECLEARANCE OF THE CHANGE FROM ELECTION TO APPOINTMENT AT ISSUE IN THIS CASE

Section 5 requires Alabama to obtain preclearance before seeking to administer changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure," 42 U.S.C. § 1973c(a), regardless of which state officials decided the change should be made, why they decided to make it, or whether the change has a racially

discriminatory purpose or effect. In this case, Governor Riley decided to use gubernatorial appointment to fill the vacant seat on the Mobile County Commission. To be sure, his decision later received the imprimatur of the Alabama Supreme Court in its decision in *Riley v. Kennedy*. But the state court's involvement does not change the simple fact that Alabama is a covered jurisdiction, and it has sought to fill the vacancy on the Mobile County Commission by using a practice different from the last precleared practice in force or effect, which was special election pursuant to Act 85-237. Therefore, as the three-judge district court properly concluded, Alabama cannot implement the return to gubernatorial appointment without obtaining preclearance.

A. Section 5 Requires Preclearance of Changes from Election to Appointment

Governor Riley attempts to paint this case as involving an "unprecedented expansion" of Section 5. Riley Br. at 2. To the contrary: the three-judge court and the Department of Justice correctly resolved the coverage question in reliance entirely on decades-old precedents that this Court has squarely reaffirmed.

The Governor does not even cite this Court's seminal Section 5 decision, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). *Allen* held that when the selection of "an important county officer" is "made appointive instead of elective" the "power of a citizen's vote is affected." *Id.* at 569. "Such a change," the Court noted, "could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such

changes to scrutiny." *Id.* at 570. In *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502-03 (1992), this Court reaffirmed that changes from election to appointment remain one of four paradigmatic "typologies" that require preclearance. The Department of Justice's regulations have also consistently recognized that Section 5 covers "[a]ny change in the term of an elective office or an elected official or in the offices that are elective," including "changing from election to appointment." 28 C.F.R. § 51.13(i).

In light of *Allen*, Alabama was required to obtain preclearance before implementing Act 85-237's provision for special elections, as in fact it did. J.A. 20. In turn, the State was then required to preclear any change abandoning special elections, whether it did so because the legislature changed its mind as a matter of policy or because it concluded that the prior legislation was unconstitutional. *See infra* at 45-47 (a precleared practice becomes a new baseline). Similarly, preclearance would be required if executive officials became convinced that the special elections were a bad idea or violated the state constitution. And as we next explain, preclearance is also required if officials in a covered jurisdiction change a practice in response to or in anticipation of a state court decision.

B. The Plain Language of Section 5, as Consistently Interpreted by this Court and the Department of Justice, Creates No Exemption for Changes Approved by State Courts

Governor Riley's argument as to why preclearance is not required turns on the involvement

of the Alabama Supreme Court in his decision not to use Act 85-237. This argument, however, contravenes the plain language of Section 5 and the consistent interpretation of that language by this Court and the Department of Justice.

1. The language of Section 5 is categorical. "Whenever" a covered jurisdiction enacts or seeks to administer "any" voting practice or procedure, it must obtain preclearance. 42 U.S.C. § 1973c(a). Both the word "whenever" and the word "any" show that Congress required preclearance of *all* voting changes made by covered jurisdictions.

"When used as a conjunction, [whenever] is defined to mean, 'At any or all times that; in any or every instance which'. Either as an adverb or conjunction, the word 'whenever' cannot be defined as a restrictive word." *Hobby v. Hodges*, 215 F.2d 754, 758 (10th Cir. 1954) (quoting Webster's New International Dictionary of the English Language). Earlier this Term, this Court once again affirmed that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, No. 06-9130, slip op. at 4-5 (Jan. 22, 2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). An expansive reading of the word "any" is particularly appropriate absent any "restrictive language," *Ali*, slip op. at 5.

Both this Court and Congress have interpreted the word "any" in Section 5 to include all changes. Immediately after quoting the statutory language, this Court emphasized that "[t]he Act requires preclearance of *all* voting changes." *Branch v. Smith*, 538 U.S. at 262 (emphasis in the original). Moreover,

as this Court noted in *Dougherty County*, 439 U.S. at 38, "[h]ad Congress disagreed with this broad construction of § 5, it presumably would have clarified its intent when re-enacting the statute in 1970 and 1975." To the contrary, Congress has repeatedly reaffirmed the natural reading of "any": "Confirming" this Court's decisions, in 1975 both the Senate and House reports "stated, without qualification, that 'Section 5 of the Act requires review of *all* voting changes prior to implementation by the covered jurisdictions.'" *Dougherty County*, 439 U.S. at 39 (quoting S. Rep. No. 94-295, p. 15 (1975); H.R. Rep. No. 94-196, p. 8 (1975)) (emphasis in this Court's opinion).

In the face of this plain language, the Governor nonetheless reads Section 5 as if "whenever" means "sometimes" and "any" means "some." He would require Congress to add phrases like "without limitation" or "even if a state court approves the proposed change" in order to reach the change in this case. But given that Section 5 was intended to deal with the ingenuity of covered jurisdictions, *see supra* at 4-7, "Congress could not have chosen a more all-encompassing phrase." *Ali*, slip op. at 6. Thus, this Court can "have no reason to demand that Congress write less economically and more repetitiously." *Id.*

2. This Court's longstanding precedents reinforce the plain-language conclusion that Section 5 requires preclearance whenever a change reflects a covered jurisdiction's "policy choices," whatever the source of those choices. *Young v. Fordice*, 520 U.S. 273, 284 (1997); *see also, e.g., Lopez v. Monterey County*, 519 U.S. 9, 22 (1996) (stating that preclearance is required "where a court adopts a proposal 'reflecting

the policy choices ... of the people [in a covered jurisdiction]'") (ellipses and bracketed material in the original)); *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981) (preclearance is required "no matter what constraints have limited the choices available to" elected officials); *Allen*, 393 U.S. at 565 n.29 (requiring preclearance even when states make changes in an effort to comply with federal law). Thus, this Court has squarely held that Section 5 "requires preclearance of *all* voting changes, and there is no dispute that this includes voting changes mandated by order of a state court." *Branch*, 538 U.S. at 262 (emphasis in the original; internal citations omitted).

The Governor seeks to distinguish *Branch* with the puzzling assertion that a court's adoption of a redistricting plan is not a "core judicial-review function." Riley Br. at 43. But this Court has long recognized that a court's decision to craft a redistricting plan is "an appropriate and well-considered exercise of judicial power." *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964). Indeed, the dozens of federal courts that have struck down congressional, state, county, and local apportionments and then found it necessary to craft new plans when states failed to cure the constitutional violations would no doubt be surprised to learn that their acts somehow fall outside the "core judicial-review function" of protecting citizens' constitutional rights.

In any event, *Branch* itself shows why the Governor's distinction is specious. To support its holding that there was "no dispute" about the coverage of state court-mandated changes, *Branch*

cited *In re McMillin*, 642 So. 2d 1336 (Miss. 1994). *See* 538 U.S. at 262. *McMillin* concerned a chancery court order that simply enjoined an upcoming primary election. *See* 642 So. 2d at 1337. The Mississippi Supreme Court held that that order constituted a change "subject to § 5 preclearance or approval." *Id.* at 1339. Even under Governor Riley's artificial distinction, the order in *McMillin* falls on the "core judicial-review function" side of the line.

This Court's decision in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), further confirms that Section 5 covers changes mandated by state court decisions. *Hathorn* involved a 1964 Mississippi statute governing the selection of school board trustees. The statute contained a provision that applied only to a school district "embrac[ing] the entire county in which Highways 14 and 15 intersect." *See id.* at 258. That description applied to only one county, Winston County, and its officials originally declined to implement the county-specific provision because they believed that it "violated a state constitutional provision against local ... legislation." *Id.* In 1979, however, the Mississippi Supreme Court struck the specific reference to the two highways from the statute, upholding the remaining requirement that affected school districts elect one trustee from each county supervisory district. *See Lovorn v. Hathorn*, 365 So. 2d 947 (1979). In light of the Mississippi Supreme Court's decision, the Winston County Chancery Court set out procedures to govern elections under the redacted statute, deriving various requirements from other provisions of Mississippi law. *See* 457 U.S. at 259. The chancery court then required local officials to seek preclearance of the election plan. But after the Attorney General

objected to the plan's inclusion of a runoff requirement, the Mississippi Supreme Court held that preclearance was not required and ordered the election plan into effect. *Carter v. Luke*, 399 So. 2d 1356 (Miss. 1981).

This Court reversed. It noted that the local officials "[did] not dispute that the change in election procedures ordered by the Mississippi courts is subject to preclearance under § 5," 457 U.S. at 265, and an accompanying footnote elaborated on that point, explaining that "the presence of a court decree does not exempt the contested change from § 5" because "§ 5 applies to any change 'reflecting the policy choices of the elected representatives of the people,' even if a judicial decree constrains those choices," *id.* at 265 n. 16 (quoting *McDaniel*).

Governor Riley tries to distinguish *Hathorn* by conflating the question whether changes required by a state court decision are subject to preclearance with an entirely different question—whether a particular state court decision actually effects a change. Appellees address that latter question *infra* at 49-51. But *Hathorn* squarely establishes that the answer to the first question is "yes": the fact that a covered jurisdiction makes a change because a state court has ordered it to do so does not relieve the jurisdiction of the obligation first to obtain preclearance. "The presence of a court decree does not exempt the contested change from § 5." 457 U.S. at 265 n.16.

3. The Department of Justice's response to the State's preclearance submission reinforces the district court's conclusion that Section 5 required preclearance. This Court "traditionally afford[s] substantial deference to the Attorney General's

interpretation of § 5 in light of [his or] her 'central role . . . in formulating and implementing' that section." *Lopez v. Monterey County*, 525 U.S. 266, 281 (1999) (quoting *Dougherty County*, 439 U.S. at 39); *see also NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985) ("Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference.").

Under the applicable regulations, "[t]he Attorney General will make no response on the merits" with respect to a submission that seeks preclearance for actions not within the scope of Section 5; instead, he will "notify the submitting authority of the inappropriateness of the submission." 28 C.F.R. § 51.35; *see also Perkins v. Matthews*, 400 U.S. 379, 393 (1971) (identifying three categories of submissions: those "the Department [does] not consider within the scope of § 5"; those to which it does not object; and those to which it objects as discriminatory). In this case, the Department twice rejected Alabama's suggestion that its submission involved actions outside the scope of Section 5. The Governor has provided no reason for rejecting the Department's conclusion on the question whether preclearance was *required*. As to the question whether preclearance should have been *granted*, that issue is not now properly before this Court: if Alabama wishes to obtain preclearance, it must now do so through a declaratory judgment action in the U.S. District Court for the District of Columbia. Appellees note, however, that the Department's conclusion that the change had a potentially retrogressive effect was borne out by the actual

events in this case: when given the opportunity to indicate their choice of a commissioner to represent them, the voters in District 1 decisively repudiated the Governor's selection, electing a different candidate by a margin of nearly four to one. *See supra* at 21.

C. Neither Logic nor History Supports the Governor's Proposed Exemption

1. The Governor claims that Section 5 should take into account what he sees as fundamental distinctions between state courts and all other organs of state government. *See also* Br. *Amicus Curiae* of Former State Court Justices. As an initial matter, his claim is beside the point: Congress made no such distinction. Indeed, the record before Congress shows that such a distinction would in fact have fatally undermined Section 5.

Moreover, this Court has often refused to draw such an artificial line. Particularly with respect to elected state courts (like Alabama's), the idea of the "complete separation of the judiciary from the enterprise of 'representative government' . . . . is not a true picture of the American system. Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002);[22]

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[22] *Baldwin County v. Jenkins*, 494 So. 2d 584, 586 (Ala. 1986), illustrates this point. There, the Alabama Supreme Court acknowledged that its prior decisions had offered four "different" interpretations of Alabama Const. § 105 and that three of those interpretations would have permitted "local laws contrary to . . . general laws on the same subject"—the issue before the court in *Stokes*.

see also Chisom v. Roemer, 501 U.S. 380, 399 n.27 (1991) (recognizing in the context of the Voting Rights Act that "judges do engage in policymaking at some level").

In particular, this Court has recognized that state courts make value choices related to voting practices. For example, in *Growe v. Emison*, 507 U.S. 25, 35-36 (1993), this Court held that a federal court should have given the same weight to a state court's reapportionment plan that it would have given a plan formulated by a state legislature.

2. Given the role state courts had played in the exclusion of black citizens, *see supra* at 4-7, it is inconceivable that Congress intended to create—but did not bother to write into the statute—the exemption the Governor seeks. To have done so in 1965 would have "opened a loophole in the statute the size of a mountain." *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring). Congress knew of the danger that state courts might participate in abridging minority citizens' voting rights. Attorney General Katzenbach actually opened his testimony in support of the Act by describing the activities of Alabama Circuit Judge James Hare, who had "convicted, and punished Negroes discriminatorily, and had issued and enforced injunctions preventing Negroes from organizing and discussing their grievances" during the Selma voting rights campaign. *Voting Rights: Hearings Before Subcomm. No. 5 of the House Judiciary Comm. on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitution of the United States*, 89th Cong., 1st Sess. 8 (1965); *see also United States v. Clark*, 249 F. Supp. 720 (S.D. Ala.

1965) (three-judge court) (describing Judge Hare's activities); Br. *Amicus Curiae* of the NAACP Legal Defense Fund (discussing southern courts at the time of the 1965 Act).

3. Affirming the position taken by the district court and the Department of Justice would impose no new burden on covered jurisdictions. Covered jurisdictions have been submitting changes that have been prompted by state court decisions for decades. *See* Br. *Amicus Curiae* of the American Civil Liberties Union. Contrary to claim of several covered jurisdictions, Br. *Amicus Curiae* of Florida et al. 13, preclearance is not required for "*every judicial interpretation.*" Rather, covered jurisdictions need only preclear actual changes to practices in force or effect.

4. The Governor's argument that the decisions in *Stokes* and *Riley* were race-neutral, Riley Br. at 2, has no bearing on the fact that the change from election to appointment required preclearance. "[I]n determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." *Dougherty County*, 439 U.S. at 42. Accordingly, in the coverage suit below, appellees were not required either to plead or to prove that the decisions were purposefully designed to abridge the voting rights of African American citizens. Nor were they required to show that following those decisions would have a retrogressive effect. The decision whether preclearance should be granted was confided by Congress not to the local federal district court or to this Court reviewing a coverage decision, but to

either the U.S. District Court for the District of Columbia or the Department of Justice. 42 U.S.C. § 1973c(a).

In any event, Alabama's own history, as well as the voluminous record before Congress from other covered jurisdictions, shows that a change from election to appointment has the *potential* for discrimination. History also reveals that this *potential* for discrimination is not somehow obviated by the involvement of a state court. This very case shows that using gubernatorial appointment rather than special election can "diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission." M.D.A. App. 6a. Thus, the district court and the Department of Justice correctly concluded that preclearance was required.

D. The District Court and the Department of Justice Properly Concluded That Special Election is the Proper Section 5 Baseline in This Case

The Governor finally argues that even if changes undertaken with the imprimatur of a state court decision require preclearance, no preclearance is required here because there was no change. He argues that because the State used gubernatorial appointment to fill such vacancies on the coverage date, November 1, 1964, that practice remains the "baseline" against which change should be measured, despite the passage, preclearance, and actual use of special elections pursuant to Act 85-237. The Governor's argument would require this Court to overturn a series of its precedents, reject the

consistent position taken by the relevant regulations, and ignore Congress's treatment of the issue.

1. This Court has long held that the appropriate baseline in a Section 5 case is measured by the practice "*in fact* 'in force or effect'" on the coverage date, *Perkins*, 400 U.S. at 395, only "[a]bsent relevant intervening changes." *Presley v. Etowah County Comm'n*, 502 U.S. at 495. The baseline changes when a jurisdiction implements a new, precleared practice or when a federal court imposes a new practice to remedy a violation of federal law.[23]

When the new practices are implemented, they "become part of the baseline standard for purposes of determining whether a State has 'enact[ed]' or is 'seek[ing] to administer' a 'practice or procedure' that is 'different' enough itself to require preclearance." *Young v. Fordice*, 520 U.S. 273, 281 (1997) (quoting *Presley*, 502 U.S. at 495). The essential question is whether the practices at issue in the coverage lawsuit are different from "those [practices] in existence before they were adopted." *Presley*, 502 U.S. at 495.

This Court has consistently used post-1964 practices as baselines. Most recently, in *Georgia v. Ashcroft*, 539 U.S. 461, 469 (2003), this Court treated the state's 1997 redistricting plan (and not the plan in effect in November 1964) as "the benchmark plan for this litigation [in which the state sought judicial preclearance] because it was in effect at the time of the 2001 redistricting effort." Similarly, in *Abrams v.*

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[23] When a federal court orders the adoption of a new practice, the practice must be precleared unless it was developed entirely by the federal court itself. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981); 28 C.F.R. § 51.18.

Johnson, 521 U.S. 74, 84-85 (1997), this Court looked to a congressional districting plan adopted in 1982 (and not the plan in effect in 1964) as the appropriate baseline for post-1990 redistricting efforts. So, too, in *Young v. Fordice*, 520 U.S. 273, 282 (1997), the Court declared it did not need to "look further back in time than 1994" under either party's theory of the case. *See also Busbee v. Smith*, 549 F. Supp. 494, 500, 516 (D.D.C. 1982) (three-judge court) (treating Georgia's precleared 1972 redistricting plan as the relevant baseline for deciding a Section 5 declaratory judgment action seeking preclearance of the 1981 plan), *aff'd*, 459 U.S. 1166 (1983).

Under the Governor's novel theory, this Court was wasting its time in *Georgia v. Ashcroft* and *Abrams*. Since Georgia had no congressional or state legislative districts in 1964 from which black voters elected candidates of their choice, there was no reason for this Court to struggle over whether the plans before it satisfied Section 5's nonretrogression standard: *any* plan would have done so. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478-79 (1997) (a change that does not "*increase* the degree of discrimination" satisfies the nonretrogression standard of § 5") (quoting *Lockhart*, 460 U.S. at 134)).

"Had Congress disagreed with" this Court's treatment of baselines, "it presumably would have clarified its intent when re-enacting the statute . . ." *Dougherty County*, 439 U.S. at 38. Instead, in the 2006 amendments and extensions to the Voting Rights Act, Congress ratified the use of prior precleared practices as the appropriate baseline. *See, e.g.*, H.R. Rep. No. 109-478, p. 24 (2006) (treating the appropriate baseline for the post-2000 Georgia

congressional reapportionment as the 1997 plan); *id.* at 67 (treating the appropriate baseline for the post-1980 Georgia congressional reapportionment as the post-1970 plan).

2. Section 5 also requires preclearance of changes that revert to prior practices or procedures. The Attorney General's regulations confirm that "[a]ny change affecting voting, even though it . . . *returns to a prior practice or procedure*, . . . must meet the Section 5 preclearance requirement." 28 C.F.R. § 51.12 (emphasis added). Thus, the fact that Governor Riley sought to return to the practice in place in November 1964—gubernatorial appointment to fill vacancies on the Mobile County Commission—does not exempt his decision from the preclearance requirement.

The purpose of Section 5 requires this result. In enacting Section 5, Congress was particularly concerned with preventing states from doing away with advances minorities might make through either litigation or political action. *See, e.g.*, H.R. Rep. No. 109-478, p. 53 (2006) ("Section 5 . . . ha[s] been and continue[s] to be a shield that prevents backsliding from the gains previously won."); *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (describing the ephemeral gains from voting rights litigation that were easily erased by innovative "discriminatory devices"). If covered jurisdictions were allowed to return to prior practices without obtaining preclearance, they would be able to erase decades of progress. For example, many covered jurisdictions that used at-large elections in 1964 later adopted single-member district plans that have enabled minority voters to elect representatives of their

choice. *See* Quiet Revolution, *supra* at 54-56 (describing such changes in Alabama). Under the Governor's reading, a covered jurisdiction could return to at-large elections whenever it so chooses, without obtaining preclearance. This would place the burden on individual minority voters to challenge the abandonment of fair election systems, "shifting the advantage of time and inertia" back to the "perpetrators"—precisely what Section 5 was intended to prevent, *South Carolina v. Katzenbach*, 383 U.S. at 328. Such a result is completely inconsistent with Section 5's requirement that a change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. . . ." 42 U.S.C. § 1973c(a).

Perhaps recognizing the problems with his theory, the Governor asserts that "[t]he Court needn't tackle today the thorny question whether §5's language would preclude a state *legislature's* unprecleared return to a November 1, 1964 practice." Riley Br. at 27. But he provides no basis for this attempt at reassurance.

In any event, that question is hardly "thorny." The Attorney General addressed this very issue more than twenty years ago.[24] The Department of Justice

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[24] Governor Riley attempts to avoid 28 C.F.R. § 51.12 by quoting language from the *Federal Register* suggesting that the "the status of changes resulting from orders of State courts is not addressed" in the regulations. Riley Br. at 27 n.8 (quoting 46 Fed. Reg. 870, 872 (Jan. 5, 1981)). But the Governor is wrong on two fronts. First, the 1981 language that he quotes predates this Court's opinions in *Hathorn* and *Branch*, which both answered that question, holding that changes resulting from state court orders *are* covered by Section 5. *See supra* at 35-38. Second, the Department added the relevant language to § 51.12

"clarified § 51.12, Scope of Requirement, to make explicit that a voting change that returns a jurisdiction to a practice that was previously in effect (e.g., to that in use on November 1, 1964) is subject to the preclearance requirement." 52 Fed. Reg. 486, 488 (Jan. 6, 1987). Thus, the Governor's argument that a change is exempted from the preclearance requirement because it returns to a practice in place in 1964, is not only inconsistent with the purpose of Section 5; it directly flouts the Attorney General's longstanding construction of the Act.

3. Special elections are the baseline practice for filling vacancies on the Mobile County Commission. It is undisputed that Act 85-237, which required that vacancies on the Commission be filled through special election, was precleared. J.A. 20. It is also undisputed that an election was actually conducted in 1987 pursuant to Act 85-237, and that Sam Jones occupied a seat on the Mobile County Commission as a result of that election. J.A. 27. These events make clear that special elections were "the system actually in effect," *Lockhart*, 460 U.S. at 132, and therefore that special elections are the baseline by which to measure subsequent changes.

That Act 85-237 was "in force or effect" is supported by this Court's prior holdings. In *Perkins*, the Court found that a city's use of ward-based aldermanic elections in 1965, though illegitimate as a matter of state law because of a 1962 statute requiring at-large election, established the relevant Section 5 baseline. This Court found that election by

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in 1987, so it is irrelevant that the 1981 regulations did not resolve the question.

wards was "the procedure *in fact* in force or effect." 400 U.S. at 394-95. Similarly, in *Lockhart*, the Court held that election by numbered posts was the relevant baseline, despite the District Court's finding that under Texas law, the City of Lockhart was not entitled to use them. *Lockhart*, 460 U.S. at 132 (noting that "[t]he proper comparison is between the new system and the system actually in effect . . . regardless of what state law might have required.").[25]

The Alabama Supreme Court's 1987 decision in *Stokes v. Noonan* did not and could not change, as a matter of federal law, the answer to the question whether special election was the practice *in fact* in

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[25] The Governor claims that *Perkins* and *Lockhart* are inapposite because they were decided "in the absence of any definitive pronouncement of what state law [was]." Riley Br. at 41. This is not precisely true, nor is it decisive. In *Perkins*, the state legislature had made very clear what the law was, and there was little doubt that the city was in violation. 400 U.S. at 394. More importantly, in both cases this Court treated the question whether the practice actually in use complied with state law as simply "irrelevant." *Id.* at 395; *Lockhart*, 460 U.S. at 132. Neither opinion suggests that the Court or Congress imagined that a state practice actually in effect could be erased as a Section 5 baseline simply because a later state court opinion announced its illegality.

The Governor also argues that it made sense for the Court in *Perkins* and *Lockhart* to focus on the practices actually being used, because "[a]llowing States to fudge the practices actually in effect on [the coverage date] on the (perhaps pretextual) ground that they were contrary to state law would have undermined Congress' program." Riley Br. at 42. This is true, but actually supports appellees' position. This same logic applies equally to subsequent baselines, which could just as easily be manipulated to discriminatory effect.

effect beginning in 1985. That question, and not the practice's compliance or noncompliance with state law, was central to the baseline inquiry.

Nor does this Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997), suggest otherwise. In *Young*, the change at issue involved a provisional plan for voter registration that had been precleared, but had not been actually enacted into law. The provisional plan was in place for only a few weeks, and "the State held no elections prior to its abandonment." *Id.* at 282-83.

Mobile's experience with Act 85-237 is entirely different. Act 85-237 was not provisional; it was actually enacted and signed into law. A full election was held in 1987 that resulted in a candidate winning the vacant seat on the Mobile County Commission, actually taking office, and serving for more than a year. The subsequent decision by the Alabama Supreme Court could not change the fact that these events occurred, and that Act 85-237 was thus actually in force or effect.

4. Nor does treating special election as the baseline pose any federalism problem. While it is true that covered jurisdictions may be required to continue using baseline practices in order to comply with federal law even if the baseline becomes illegal under state law, this is neither new nor problematic. This Court has long recognized that "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect," *Lockhart*, 460 U.S. at 133, and that, as a result, Section 5 sometimes constrains state policy choices. The idea that old laws, even if repealed, must be kept in effect

until their replacements are precleared has been a mainstay of Section 5 since *Allen*. The mere fact that the Alabama Supreme Court invalidated the old law in *Stokes*, rather than the legislature choosing to replace it, makes no difference.

The Governor ignores this fact, seeking to invert the Supremacy Clause by claiming that if a practice is later declared to violate a provision of a state's constitution, it cannot serve as a Section 5 baseline. Riley Br. at 36-38. To this end, the Governor has profoundly misread *Abrams v. Johnson*, 521 U.S. 74 (1997). *Abrams* involved Georgia's post-1990 congressional redistricting. In 1992, the Department of Justice precleared a plan that replaced the one adopted in 1982. *Id.* at 80. But in *Miller v. Johnson*, 515 U.S. 900 (1995), this Court held that the 1992 plan was unconstitutional as a matter of the *federal* Constitution. One question before the Court in *Abrams* was whether a redistricting plan adopted by a federal district court in 1995 should be analyzed by comparing it to the 1992 plan. This Court held that the 1992 plan could not serve as a benchmark because "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." *Abrams*, 521 U.S. at 97. But that holding was based on the elementary proposition that the *United States* Constitution is the Supreme Law of the Land.[26]

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[26] In any event, *Abrams* did not address the question presented in this case—namely, whether the challenged practice constituted a change requiring preclearance. The remedial plan was developed by a federal court, and thus preclearance was not required. *See* 521 U.S. at 95. Moreover, the Court said nothing to suggest that the State would have been free to replace the

The Governor's claim that "[t]he Alabama Supreme Court's decision in *Stokes* operates the same way here that this Court's decision in *Miller* operated in *Abrams*," Riley Br. at 36, is baffling. *Miller* interpreted the federal Constitution, which is supreme over all other law. *Stokes* interpreted the Alabama constitution, which is not. Just as the federal Constitution trumps all other law, federal *statutes* trump conflicting state law, whether that law takes the form of a state statute or a state constitutional provision. Federal law is indifferent to the state-law characterization of a state policy. If this were not the case, then under the Governor's theory, states could circumvent Section 5 altogether by regulating their election processes through state constitutions rather than statutes.[27] This would undermine both the purpose of Section 5 and the basic tenets of our federal system.

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unconstitutional plan with a plan devised by its own courts or the state legislature without first obtaining preclearance.

[27] The apportionments at issue in the Reapportionment Cases were the product of state constitutions, rather than ordinary legislation, but that did not prevent this Court from acting. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the legislative apportionment plan contained in the Alabama Constitution of 1901 violated the equal protection clause and that the remedy in a proposed constitutional amendment failed to cure the violation); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (striking down the legislative apportionment formula contained in the New York Constitution of 1894); *Roman v. Sincock*, 377 U.S. 695 (1964) (striking down the apportionment plan contained in the Delaware Constitution of 1897 as amended in 1963).

The Governor's claim of impermissible commandeering is equally unavailing.[28] Nothing has been commandeered here. Federal standards are constitutionally permissible when they "'regulate[] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" *Reno v. Condon*, 528 U.S. 141, 150 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). Consistent with this principle, Section 5 merely regulates the actions of covered jurisdictions, limiting the universe of voting practices from which they may choose to those that have neither a discriminatory purpose nor a discriminatory effect. That this limitation may require a state to keep a practice in place that it would prefer to change is the very essence of Section 5, an essence that this Court has repeatedly reaffirmed. Just as in *Lopez*, 525 U.S. at 285, the district court's decision in this case "adds nothing of constitutional moment to the burdens that the Act imposes."

5. The unprecleared gubernatorial appointment of Sam Jones after the 1987 election cannot serve as the Section 5 baseline. The Department of Justice regulations make clear that an unprecleared change cannot become a new baseline: if an "existing practice or procedure . . . is not otherwise legally enforceable

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[28] Appellees are puzzled as to why the Project on Fair Representation thinks that this case "draws the constitutionality of Section 5 into question." Br. *Amicus Curiae* at 3. In fact, the plain language of the Voting Rights Act precludes that possibility. Under 42 U.S.C. § 1973*l*(b) as interpreted in *Shaw v. Reno*, 509 U.S. 630, 637, 641 (1993), challenges to the Act's constitutionality must be brought before a three-judge District Court for the District of Columbia.

under Section 5, it cannot serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54(b)(1). Even if the procedure "in effect" following *Stokes* was gubernatorial appointment, it cannot serve as a Section 5 baseline absent preclearance because it was never legally enforceable under Section 5.[29] The last "legally enforceable practice or procedure" was thus special elections, and it must serve as the baseline for future changes.

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[29] Nor, contrary to the argument of some *amici*, *see* Br. *Amici Curiae* of Abigail Thernstrom and Stephan Thernstrom, does Act 2004-455 return the baseline to gubernatorial appointment. When Act 2004-455 was submitted for administrative preclearance, nothing in the submission gave notice that the 2004 Act was intended to repeal Act 85-237. Moreover, as enabling legislation, Act 2004-455 did not itself determine whether a valid local law permitted special elections in Mobile County. *See* 28 C.F.R. § 51.15(a) (stating that the failure of the Attorney General to interpose an objection to enabling legislation "does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required") and 28 C.F.R. § 51.15(b)(4) (including "[l]egislation requiring a political subunit to follow certain practices or procedures unless the subunit's charter or ordinances specify to the contrary" as an example of such enabling legislation).

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be affirmed.

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In the Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA, APPELLANT

v.

YVONNE KENNEDY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES IN PART

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QUESTIONS PRESENTED

Section 5 of the Voting Rights Act requires preclearance "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on the jurisdiction's coverage date. 42 U.S.C. 1973c(a) (2006). The questions presented are:

1. Whether appellant's notice of appeal—which was filed within 60 days of the entry of an injunction but more than 60 days after the district court issued a declaratory order—was timely.

2. Whether the implementation of a change affecting voting concerning a state law that was previously precleared and enforced is exempted from Section 5 simply because it is precipitated by a state court decision declaring that the state law violates the state constitution.

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INTEREST OF THE UNITED STATES

This appeal concerns the types of changes affecting voting that are subject to preclearance under Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c (2006). The Attorney General is responsible for reviewing electoral changes submitted for administrative preclearance and for defending actions seeking judicial preclearance; he also has authority to initiate suits to prevent the implementation of unprecleared changes. See 42 U.S.C. 1973c (2006); 42 U.S.C. 1973j(d). After the district court ruled that the voting change at issue in this case was subject to preclearance, the Attorney General reviewed the change and declined to preclear it.

STATEMENT

1. Section 5 of the VRA provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain administrative or judicial preclearance. 42 U.S.C. 1973c(a) (2006). Alabama and its political subdivisions are covered jurisdictions under Section 5, and their coverage date is November 1, 1964. See 28 C.F.R. Pt. 51, App.; 28 C.F.R. 51.6. A change in the method of filling government posts from election to appointment triggers Section 5's preclearance requirement. See 28 C.F.R. 51.13(i); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569-570 (1969).

A covered jurisdiction may seek administrative preclearance for a voting change by applying to the Attorney General. See 42 U.S.C. 1973c(a) (2006). Alternatively, a jurisdiction may seek judicial preclearance by bringing a declaratory-judgment action in the United States District Court for the District of Columbia. See *ibid.* In either case, preclearance may be granted only if the jurisdiction demonstrates that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Ibid.* A change has a discriminatory effect "if it will lead to a retrogression in the position of members of a racial * * * minority group * * * with respect to their opportunity to exercise the electoral franchise." 28 C.F.R. 51.54(a); see *Beer* v. *United States*, 425 U.S. 130 (1976).

If a covered jurisdiction attempts to implement a change affecting voting without obtaining preclearance, the Attorney General or a private party may bring an action for declaratory and injunctive relief to prevent

implementation of the unprecleared change. See 42 U.S.C. 1973j(d); *Allen*, 393 U.S. at 554-555. Such an action must be heard by a three-judge district court. See 42 U.S.C. 1973c(a) (2006).

2. a. As of November 1, 1964, the relevant date for Alabama under Section 5, Alabama law authorized the governor to make appointments to fill vacancies on county commissions. See Ala. Code § 12-6 (1959); see also Ala. Code § 11-3-6 (1977) (recodifying the authorization in slightly modified form).

b. In 1985, the Alabama legislature enacted Act No. 85-237, 1985 Ala. Laws 137 (the Act), which required that a special election be held to fill any vacancy on the Mobile County Commission so long as at least 12 months remained in the term of the vacant seat. The Attorney General precleared the Act under Section 5. J.S. App. 4a.

In 1987, a vacancy occurred on the Mobile County Commission, and the governor called a special election as required by the Act. The procedures for conducting the special election were submitted by the State and precleared by the Attorney General under Section 5. Letter from Wm. Bradford Reynolds, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Glen Browder, Secretary of State of Alabama (June 22, 1987). Shortly before the election, Willie Stokes brought an action in state court challenging the constitutionality of the Act. The trial court rejected his claim and allowed the special election to proceed.

On appeal, the Alabama Supreme Court reversed. *Stokes* v. *Noonan*, 534 So. 2d 237 (Ala. 1988). It held that Act No. 85-237 violated the Alabama Constitution, which provides that no "local law * * * shall be enacted in any case which is provided for by a general law."

Ala. Const. Art. IV, § 105. Because a general Alabama law specified that vacancies in county commissions would be filled by gubernatorial appointment, the court held that the Act could not prescribe a different procedure for Mobile County. See *Stokes*, 534 So. 2d at 239.

By the time of the Alabama Supreme Court's decision, the special election had already been held, and Sam Jones had won. J.S. App. 4a. Shortly after the decision, Alabama's governor appointed Jones to the commission seat for which he had campaigned (and won) in the election. J.A. 27. Alabama did not seek preclearance of the voting change worked by *Stokes*. J.S. App. 4a.

c. In 2004, the Alabama legislature enacted Act No. 2004-455, 2004 Ala. Laws 809, which amended Alabama Code § 11-3-6 (1989) to provide that, "[u]nless a local law authorizes a special election, in case of a vacancy [on a county commission], it shall be filled by appointment by the governor." The Attorney General precleared Act No. 2004-455 under Section 5. J.S. App. 5a.

The next year, another vacancy occurred on the Mobile County Commission. J.S. App. 5a. Appellees, three residents of Mobile County, brought an action in state court seeking a declaration that the vacancy must be filled by special election. Joint Stipulation of Fact 2. The key issue in that litigation was the meaning of Act No. 2004-455. Appellees contended that it revived Act No. 85-237, which the Alabama Supreme Court had invalidated in *Stokes*. But appellant and other defendants argued that it merely authorized the Alabama legislature to enact local laws *in the future* to permit special elections for vacancies on county commissions. See J.S. App. 26a-27a. The trial court held that the vacancy on the Mobile County Commission should be filled by spe-

cial election, and appellant appealed to the Alabama Supreme Court. *Id.* at 26a.

While the appeal was pending, Mobile County's probate judge sought and obtained preclearance of certain procedures (including a schedule) for holding the special election. J.A. 22; Joint Stipulation of Fact Exh. I. Under the precleared schedule, the general election was to take place in early January 2006. *Id.* Exh. I, Attach. B at 5. That special election did not occur, however, because in November 2005, the Alabama Supreme Court held that Act No. 2004-455 applied only prospectively and did not revive Act No. 85-237. *Riley* v. *Kennedy*, 928 So. 2d 1013 (Ala. 2005). The court concluded that Governor Bob Riley, appellant, had authority to make an appointment to fill the vacancy. *Id.* at 1017. A few days later, the governor appointed Juan Chastang to the Commission. J.S. App. 5a.[1]

3. a. Appellees then brought this action, claiming that the governor lacked authority to fill vacancies on the Mobile County Commission unless the State obtained Section 5 preclearance of the change from elec-

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[1] In response to the 2005 court decision, the Alabama legislature enacted a statute reinstating special elections as the method of filling vacancies on the Mobile County Commission. Act No. 2006-342, 2006 Ala. Laws 913. The Attorney General precleared that statute in July 2007. Letter from John Tanner, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to John J. Park, Jr., Special Ass't Att'y Gen., State of Alabama (July 10, 2007). Thus, regardless of the outcome of this appeal, future vacancies on the Mobile County Commission will be filled by special election rather than gubernatorial appointment. The case is not moot, however, because if appellant were to prevail, Chastang—who lost his seat as a result of this litigation, see pp. 7-8, *infra*—could be reinstated to complete his term, which runs through November 2008.

tion to appointment. A three-judge district court was convened to consider plaintiffs' claim. J.S. App. 3a.

On August 18, 2006, the district court held that there had been a change from election to appointment that could not be implemented unless it was first precleared under Section 5. J.S. App. 3a-8a. The court concluded that Act No. 85-237 was the appropriate baseline for determining whether there had been a change, because the Act had received preclearance and was "put in force and effect" when a special election was held in 1987 to fill a vacancy on the Mobile County Commission. *Id.* at 7a. The court rejected appellant's argument that Act No. 85-237 could not serve as the baseline because the Alabama Supreme Court had declared that law unconstitutional. *Ibid.* The court explained that it was "required to determine the baseline 'without regard for [its] legality under state law.'" *Ibid.* (quoting *City of Lockhart* v. *United States*, 460 U.S. 125, 133 (1983) (*Lockhart*)).

The district court emphasized that it was "in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in these two cases, or that the governors acted in accordance with state law in making the appointments" to the Mobile County Commission. J.S. App. 8a. Rather, the court stated, it was simply holding that federal law required that the change precipitated by those decisions be precleared before it was "implemented." *Ibid.*

The district court did not enter an injunction. Instead, it gave the State 90 days in which to seek preclearance. J.S. App. 8a, 9a. Its order stated that "if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy." *Id.* at 9a.

b. Appellant did not immediately appeal the district court's decision. Instead, he sought administrative preclearance of the change from election to appointment. Motion to Dismiss or Affirm (MDA) App. 2a-3a. The Attorney General interposed an objection to the change through the Assistant Attorney General for the Civil Rights Division. *Id.* at 2a-8a. He concluded that the State had failed to meet its burden of proof in establishing that the change in the method of filling vacancies on the Mobile County Commission—from election to appointment—was not retrogressive. *Id.* at 6a. He explained that, because they constitute over 63% of the population and registered voters in the district at issue, African-American voters "enjoy the opportunity to elect minority candidates of their choice to the County Commission," and, indeed, enjoyed that power "in the 1987 special election in which Act 85-237 was first implemented." *Ibid.* By contrast, "[t]here is no dispute that the change [from election to appointment] would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters" of the district at issue. *Ibid.*

In concluding that appellant had not met his burden of showing "that the change is not retrogressive," MDA App. 6a, the Assistant Attorney General determined that Act No. 85-237 was the appropriate benchmark to use in conducting the retrogression inquiry. *Id.* at 5a. On this point, his reasoning mirrored the district court's analysis. *Ibid.* Appellant sought reconsideration, which was denied. *Id.* at 9a-19a.

c. On May 1, 2007, the district court entered an order vacating appellant's appointment of Chastang to the Mobile County Commission. J.S. App. 1a-2a. The court

concluded that, without preclearance of the change from special elections to gubernatorial appointment, Chastang's appointment was "unlawful under federal law." *Id.* at 2a. A special election was held to fill the resulting vacancy on the Commission; Chastang ran in the election but was defeated. MDA 8-9.

d. Appellant filed a notice of appeal on May 18, 2007. J.S. App. 11a-13a.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction over this appeal because the notice of appeal was filed within 60 days of the final judgment and is therefore timely. Although the district court entered an earlier order in which it granted declaratory relief, that order was not final because it left unresolved the question of an appropriate remedy. The time for filing a notice of appeal did not begin to run until the district court entered its later remedial order and the judgment therefore became final.

II. Under the text of Section 5 of the VRA, this Court's decisions interpreting Section 5, the Attorney General's Section 5 regulations, and longstanding practice in administering Section 5, Alabama was required to seek preclearance of the change in the method of filling vacancies on the Mobile County Commission from election to appointment before that change was implemented by state officials.

Appellant contends that Section 5 is inapplicable because the change in question was precipitated by decisions of the Alabama Supreme Court. But the text of Section 5 does not make exceptions based on the *source* of the change in state law; rather, the statutory preclearance requirement is triggered "[w]henever" a covered jurisdiction enacts or seeks to administer "any"

change in a voting practice or procedure from that "in force or effect." 42 U.S.C. 1973c(a) (2006). And this Court has accordingly held that Section 5 applies to "*all* voting changes," including those that are "mandated by order of a state court." *Branch* v. *Smith*, 538 U.S. 254, 262 (2003). Thus, whether the source of the change is a statute, a regulation, or a court decision, Section 5 requires preclearance before officials in a covered jurisdiction may implement a change affecting voting.

Appellant argues that no change in voting practices occurred in this case because, although an Alabama statute previously called for vacancies on the Mobile County Commission to be filled by special election, that statute was later declared unconstitutional by the Alabama Supreme Court. But this argument also is contradicted by settled precedent. As this Court has held, whether a particular practice is a change must be judged by reference to the most recent practice that was "*in fact* 'in force or effect.'" *Perkins* v. *Matthews*, 400 U.S. 379, 394-395 (1971). The invalidity of the old practice under state law is irrelevant in determining whether the new practice represents a change. Here, the statute calling for special elections was actually "in force or effect" because it was not only precleared, but actually used to hold an election.

Construing Section 5 to reach all changes affecting voting, regardless of the source of the change, does not, as appellant suggests, necessarily intrude unduly on the prerogatives of state courts. As the district court below emphasized, preclearance in these circumstances does not call for federal review of the accuracy of state decisions under state law, but asks only whether a change in state law may be implemented by state officials without violating Section 5's non-retrogression command. That

federal command indeed intrudes on the sovereignty of covered jurisdictions (for historical reasons that this Court has recognized and found justified), but there is nothing unique about changes precipitated by a state court—as opposed to a state legislature or regulatory body—that warrants carving an exception out of Section 5's unambiguous terms. Although a state judicial decision may suggest that the baseline procedure is not a permissible option under state law, state legislative or executive action could equally be prompted by such a view, and that is not a basis to exempt the actions of any branch of state government from preclearance.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL

This Court has jurisdiction over appeals from final judgments of three-judge district courts in cases brought under Section 5 of the VRA. See 42 U.S.C. 1973c(a) (2006). To invoke the Court's jurisdiction, an appellant must file a notice of appeal within 60 days of the judgment. See 28 U.S.C. 2101(b). In this case, the district court entered a final judgment on May 1, 2007, when it vacated Juan Chastang's appointment as a Mobile County Commissioner. J.S. App. 1a-2a. The notice of appeal was filed 17 days later and is therefore timely. *Id.* at 11a-13a.

Appellees contend (Br. 25-28) that the district court's August 2006 decision was a final judgment that triggered the 60-day deadline of Section 2101(b), meaning that the notice of appeal was seven months too late. They note (Br. 27) that the district court directed the clerk to enter the August 2006 decision as "a final judgment." J.S. App. 10a. A court's characterization of its own decision is not dispositive, however, and an appel-

late court must decide for itself whether an order is final. See *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990); *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 741-742 (1976).

The August 2006 decision was not final. Although that decision determined that the State had violated Section 5, it left unresolved the question of an appropriate remedy. See J.S. App. 9a-10a. "[A] decision is not final, ordinarily, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Cunningham* v. *Hamilton County*, 527 U.S. 198, 204 (1999) (internal quotation marks and citation omitted). In particular, a decision is not final when it determines liability but does not resolve all of a plaintiff's requests for relief. See *Liberty Mut. Ins. Co.*, 424 U.S. at 742. In their complaint, appellees sought both declaratory and injunctive relief, including an order forbidding anyone appointed by the governor from serving on the Mobile County Commission unless the State first obtained preclearance. J.A. 11. But in its August 2006 decision, the district court did not issue an injunction. Instead, it deferred resolution of an appropriate remedy, promising to "revisit the issue" in the event that the State failed to obtain preclearance within 90 days. J.S. App. 9a.

Contrary to appellees' suggestion (Br. 27), the district court did not "order" the State to seek preclearance. The court simply made clear that, before it would "consider taking any action regarding the appointment of Juan Chastang," it would "give the State 90 days to obtain the necessary preclearance." J.S. App. 8a. Had the State failed to seek preclearance, appellant would not have been subject to contempt sanctions; the court would merely have "revisit[ed] the issue of remedy," *id.*

at 9a, as it ultimately did once preclearance was sought and denied. Because the August 2006 judgment did not include the injunction that plaintiffs requested (and later obtained), it was not final.

Adopting appellees' jurisdictional theory would encourage piecemeal appeals in Section 5 cases. By contrast, allowing a defendant to postpone appeal while it seeks preclearance of a particular change may obviate the need for appellate review; if preclearance is granted, the case will likely be moot. See, *e.g.*, *Berry* v. *Doles*, 438 U.S. 190, 192-193 (1978). Avoiding unnecessary appellate litigation is particularly important where, as here, the parties have a right of direct appeal to this Court. Cf. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 470 n.12 (1985). In addition, the fact that Section 5 litigation often involves sensitive issues also counsels against encouraging unnecessary appeals in those cases.

II. THE DISTRICT COURT CORRECTLY HELD THAT ALABAMA IMPLEMENTED A CHANGE AFFECTING VOTING THAT IS SUBJECT TO SECTION 5 PRECLEARANCE

Appellant incorrectly characterizes the change at issue in this case, consistently describing the relevant governmental action as "two decisions" of the Alabama Supreme Court. It is not the decisions themselves, however, that are subject to Section 5 preclearance. Rather, it is the change affecting voting that resulted from the implementation of those decisions—namely, the change in the method of filling vacancies on the Mobile County Commission from election to appointment as manifested by the governor's appointment. The text of Section 5 and this Court's precedents make clear that such a change is subject to preclearance, and appellant's efforts to resist that conclusion are unavailing.

A. Section 5 Applies To All Changes Affecting Voting, Even When Those Changes Are Triggered By State Courts

Section 5 requires covered jurisdictions to obtain preclearance "[w]henever" they "enact or seek to administer any" change affecting voting. 42 U.S.C. 1973c(a) (2006). Congress's use of capacious language like "whenever" and "any" reflects its intent to reach *all* changes in voting procedures or practices that covered jurisdictions may "enact or seek to administer." See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning.").

The use of the disjunctive—"enact" *or* "seek to administer"—implies that those terms have different meanings in the statute. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993). And in ordinary usage, "administer" has a meaning that is different from and broader than "enact." The word "enact" ordinarily refers to the process by which a legislative body votes a bill into law. See *Black's Law Dictionary* 567 (8th ed. 2004) (*Black's*) ("[t]o make into law by authoritative act; to pass"); *Webster's Third New International Dictionary of the English Language* 745 (1986) (*Webster's*) ("to establish by legal and authoritative act: make into a law; *esp*: to perform the last act of legislation upon (a bill) that gives the validity of law"); see also *Branch*, 538 U.S. at 264. The word "administer," by contrast, more commonly refers to the implementation of an established legal requirement. See *Webster's* 27 ("to direct or superintend the execution, use, or conduct of"); *Black's* 46 (defining "administration" as "[t]he management or performance of the executive duties of a government"). In other words, it "encompasses nondiscretionary acts" by officials "endeavoring to comply with the

superior law of the State." *Lopez* v. *Monterey County*, 525 U.S. 266, 279 (1999).

When a state official attempts to implement a practice affecting voting that is different from a practice previously administered in that jurisdiction, the official "seek[s] to administer" a change affecting voting, and he or she must submit it for preclearance. Section 5 makes no distinction among the numerous potential sources of such a change—whether an agency makes the change on its own motion or because of an intervening state court decision. Accordingly, the statute explicitly requires preclearance before a state official may implement a voting change ordered by a state court.

That is not a novel proposition. This Court has previously recognized that Section 5 "requires preclearance of *all* voting changes * * * and there is no dispute that this includes voting changes mandated by order of a state court." *Branch*, 538 U.S. at 262. Thus, in *Branch*, the Court concluded that a redistricting plan imposed by a Mississippi state court was subject to Section 5 preclearance. *Id.* at 265. As the Court explained, "[t]here is no doubt that the State was 'seek[ing] to administer' the changes" mandated by the state court's decision. *Ibid.*; see *LULAC* v. *Texas*, 995 F. Supp. 719, 725 (W.D. Tex. 1998) (three-judge court).

Similarly, in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), this Court concluded that a Mississippi Supreme Court decision had resulted in a change affecting voting that was subject to Section 5 preclearance. *Id.* at 265 & n.16, 270. In that case, county officials refused to implement a state statute requiring election of school board members from single-member districts. After the Mississippi Supreme Court upheld the statute's core requirement that board members be elected by district, a state

trial court ordered that elections be held, and it further required that a run-off be held if no candidate received a majority. The county officials submitted the court-ordered change to the Attorney General, who interposed an objection to the run-off requirement. The Mississippi Supreme Court then ordered that elections be held under the state statute, without regard to whether the county had obtained Section 5 preclearance. *Id.* at 257-261. This Court reversed. Concluding that "the [court-ordered] change in election procedure [was] subject to § 5," *id.* at 270, the Court observed that "the presence of a court decree does not exempt the contested change from § 5." *Id.* at 265 & n.16.

These decisions—interpreting and giving effect to the broad terms of Section 5—resolve the question here as a matter of *stare decisis*. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989) ("[C]onsiderations of *stare decisis* have special force in the area of statutory interpretation.").

B. Act No. 85-237 Is The Relevant Baseline For Identifying A Change In Voting Practices Under Section 5

"To determine whether there have been changes with respect to voting" under Section 5, a court "must compare the challenged practices with those in existence before they were adopted." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 495 (1992). This Court has often used the term "baseline" to refer to the "status quo that is proposed to be changed." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000). Applying that well-settled law, the district court correctly held that Act No. 85-237, which mandates special elections to fill vacancies on the Mobile County Commission, is the relevant baseline for determining whether a gubernatorial appointment to the

commission represented a voting change that was subject to Section 5 preclearance. And using that baseline, the court was correct to hold that a change took place.

1. The appropriate Section 5 baseline is the practice currently "in force or effect"

Appellant suggests (Br. 26-27) that when a covered jurisdiction reverts to a practice that was in place on its coverage date (in Alabama's case, November 1, 1964), the change might not be covered by Section 5, since the practice would not be "different from that in force or effect on November 1, 1964." 42 U.S.C. 1973c(a) (2006). That suggestion should be rejected. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Appellant's suggested reading would have the perverse result of leaving some minor retrogressive changes subject to Section 5 scrutiny, while creating a safe harbor for jurisdictions to regress all the way back to their 1964 practices, thus encouraging the very retrogression that the statute aims to prevent.

By setting a coverage date in Section 5, Congress merely established the first baseline against which the potentially discriminatory nature of future practices would be judged, with the natural assumption, if not expectation, that the baseline would advance as voting practices progressed in covered jurisdictions. Nothing in the statute or its history supports an interpretation that would permit covered jurisdictions to make discriminatory changes affecting voting as long as those changes did not institute voting practices that were worse than those in place in 1964. Adopting that interpretation

more than 40 years after the passage of Section 5—during which time covered jurisdictions have made considerable strides in their ongoing effort to improve voting practices—could have a significant retrogressive effect on voting practices in such jurisdictions.

Every court to consider the issue has concluded that a reversion to a voting practice in place on the Section 5 coverage date is a change subject to preclearance. See *Gresham* v. *Harris*, 695 F. Supp. 1179, 1183 (N.D. Ga.) (three-judge court), vacated *sub nom. Poole* v. *Gresham*, 488 U.S. 978 (1988), reinstated opinion aff'd, 495 U.S. 954 (1990); *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (three-judge court), aff'd, 456 U.S. 1002 (1982); *NAACP, DeKalb County Chapter* v. *Georgia*, 494 F. Supp. 668, 677 (N.D. Ga. 1980) (three-judge court). Although this Court has not directly confronted the issue, it has never suggested that reversions to practices in place on the coverage date are exempt from the statute. To the contrary, the Court has stated categorically that, "[i]n § 5 preclearance proceedings * * * the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied." *Bossier Parish Sch. Bd.*, 528 U.S. at 334; see *Presley*, 502 U.S. at 495 ("*Absent relevant intervening changes*, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison.") (emphasis added). In determining the appropriate baseline in *Young* v. *Fordice*, 520 U.S. 273 (1997), for example, this Court noted that the statute's coverage date "often, as here, is not directly relevant, for differences once precleared normally need not be cleared again." *Id.* at 281. Instead, "[t]hey become part of the baseline standard for purposes of determining whether a State has 'en-

act[ed]' or is 'seek[ing] to administer' a 'practice or procedure' that is 'different' enough itself to require preclearance." *Ibid.*

In addition, the Attorney General has consistently rejected an interpretation of Section 5 that would exclude from the preclearance requirement any change that merely reverts to a practice in place on November 1, 1964. Under a regulation in place since 1987, a voting change is subject to preclearance "even though it * * * returns to a prior practice or procedure." 28 C.F.R. 51.12. In promulgating that regulation, the Attorney General explained that the rule was intended "to make explicit that a voting change that returns a jurisdiction to a practice that was previously in effect (*e.g.*, to that in use on November 1, 1964) is subject to the preclearance requirement." 52 Fed. Reg. 488 (1987). That regulation reflects an interpretation of Section 5 that is entitled to "substantial deference." *Lopez*, 525 U.S. at 281.

Significantly, Congress has twice reauthorized or amended parts of the VRA since that regulation without changing the relevant language of Section 5. See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); see *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 38 (1978). In reauthorizing the statute, Congress should be presumed to have endorsed the settled construction that reversions to pre-1964 practices are not exempt from Section 5.

2. *An existing practice's invalidity under state law is irrelevant*

Appellant contends (Br. 36-38) that Act No. 85-237 cannot serve as the Section 5 baseline because the Alabama Supreme Court declared the act unconstitutional under state law. However, the text of Section 5 focuses the inquiry on whether there has been a change from a practice that was "in force or effect." A practice is "in force or effect" if it is actually carried out by state officials, whether or not it is later found to be unlawful. Cf. *Black's* 794 (defining "in force" as "[i]n effect; operative"). Accordingly, this Court has made clear that a covered jurisdiction must obtain preclearance before changing any voting practice that is "*in fact* 'in force or effect,'" even if the motivating reason for the change is that the existing practice violates state law. *Perkins*, 400 U.S. at 394-395; accord *Lockhart*, 460 U.S. at 132-133.

a. In *Perkins*, this Court held that the City of Canton, Mississippi, was required to obtain preclearance before holding at-large elections for aldermen in 1969. The use of an at-large system represented a change because, in the 1965 election, the city had selected aldermen by ward. *Perkins*, 400 U.S. at 394-395. The Court held that preclearance was necessary even though the ward-based system used in 1965 had violated a pre-existing state statute requiring at-large elections. *Id.* at 394. Concluding that "the procedure *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards," the Court held that the 1969 change was subject to preclearance, even though it was designed to bring the city into compliance with state law. *Id.* at 394-395.

Later, in *Lockhart*, this Court reaffirmed that the validity under state law of a jurisdiction's voting-related practice is "essentially irrelevant" to the Section 5 inquiry, 460 U.S. at 132, because "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." *Id.* at 133. The issue in that case was whether voting changes that the City of Lockhart, Texas, implemented in 1973 were retrogressive as compared to the voting system in place on November 1, 1972, Texas's coverage date under Section 5. *Id.* at 127-130, 132-133. In deciding the retrogression question, the district court had determined that the relevant baseline was the voting system authorized under state law, not the system that the city actually used before 1973. *Id.* at 130, 132. This Court rejected that analysis, emphasizing that "[t]he proper comparison is between the new system and the system *actually in effect* on November 1, 1972, *regardless of what state law might have required.*" *Id.* at 132 (emphasis added; footnote omitted).

Congress ratified the holdings in *Perkins* and *Lockhart* when it reauthorized Section 5 in 1975, 1982, and 2006, without changing the relevant language of Section 5. The general presumption that Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute when it reenacts that statute without altering the relevant language is particularly appropriate here because "in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the 'broad interpretations to the scope of Section 5' in * * * *Perkins*." *White*, 439 U.S. at 39 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 16 (1975), and H.R. Rep. No. 196, 94th Cong., 1st Sess. 9 (1975)).

b. Appellant offers two theories for distinguishing *Perkins* and *Lockhart*, but neither is persuasive. First, he points out (Br. 40) that the cases did not involve "a state supreme court's authoritative determination of state law." That is true but beside the point. An authoritative judicial opinion is just one way of removing any legitimate dispute about a provision's validity under state law. In *Perkins*, even without such an opinion, there was no dispute that the practice of ward-based elections was, in fact, unlawful under Mississippi law. See 400 U.S. at 394 & n.12. In light of that lack of dispute, a state-court declaratory judgment action could have confirmed the invalidity of ward-based elections. Nothing in this Court's opinion in *Perkins* suggests that the preclearance requirement could have been sidestepped simply by bringing such an action.

Second, appellant notes (Br. 41-43) that neither *Perkins* nor *Lockhart* involved invalid state statutes that were precleared after the coverage date of Section 5. He reasons (Br. 42) that, although "Congress had good reason in 1965 to freeze into place" practices then in force, "the same logic doesn't hold" with respect to practices that were "not enacted or implemented until long *after* November 1, 1964." That argument is simply a variation on appellant's suggestion that Section 5 might permit retrogression to practices that were in place on a jurisdiction's coverage date—a suggestion that is at odds with the settled administrative and judicial construction of the statute. See pp. 17-18, *supra*. Moreover, if anything, the fact that the change is from a *precleared* practice makes it more natural to presume that preclearance will be required before implementing any departure from that practice.

c. Appellant also contends (Br. 35-38) that using Act No. 85-237 as a baseline conflicts with this Court's decision in *Abrams* v. *Johnson*, 521 U.S. 74 (1997). That is incorrect. In *Abrams*, a federal district court devised a redistricting plan to replace the legislative plan that this Court had declared unconstitutional in *Miller* v. *Johnson*, 515 U.S. 900 (1995). See *Abrams*, 521 U.S. at 77-78, 82-86. In rejecting a Section 5 challenge to that plan, this Court refused to use as a benchmark the earlier redistricting plan that had been declared invalid in *Miller*, explaining that "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." *Id.* at 97. *Abrams* is inapposite here because the plan that this Court rejected as a benchmark in that case was invalid under the *federal* Constitution. The Section 5 analysis is not so limited by state law. Indeed, the point of the VRA was to end discriminatory state voting practices, many of which were based on provisions of state constitutions and judicial constructions of such provisions. See, *e.g.*, Ala. Const. Art. VIII, § 181 (repealed 1965) (prescribing literacy test).

3. Act No. 85-237 is an appropriate baseline because it was "in force or effect" before the voting change at issue here

Finally, relying on *Young* v. *Fordice*, *supra*, appellant contends (Br. 51-56) that Act No. 85-237 cannot serve as the baseline because it was never "in force or effect." That argument is also unavailing.

In *Young*, Mississippi's secretary of state devised a new voter-registration plan in anticipation that the state legislature would pass a bill authorizing the new procedures. While the proposed legislation was pending, the Attorney General precleared the proposed plan, and some of Mississippi's registrars began using it to regis-

ter voters. It soon became clear that the Mississippi legislature would not enact the legislation necessary to make the plan valid under state law, and at that point, Mississippi officials notified registrars to stop using the new procedures. *Young*, 520 U.S. at 277-278, 282-283. This Court held that the precleared plan was never in force or effect and thus could not serve as a Section 5 baseline, emphasizing that "the State held no elections prior to its abandonment of the [plan], nor were any elections imminent." *Id.* at 283.

Act No. 85-237 is entirely different. Unlike the plan at issue in *Young*, it actually became law before it was precleared—and it undeniably went into effect. Crucially, the Act was implemented in June 1987, when a special election was held to fill a vacancy on the Mobile County Commission. See J.A. 20-21, 27. It was not until September 30, 1988—more than 15 months after the special election—that the Alabama Supreme Court declared Act No. 85-237 invalid. Although appellant describes the Act as "void *ab initio*" (Br. 25), the Alabama court's decision cannot alter the historical reality that the Act was actually in effect for the 1987 election. Even if the law never had "force" at some theoretical level, it seems impossible to deny that it was "in effect." Indeed, under appellant's position, the law never would have been in effect even if scores of elections had been conducted under the law for decades before it was invalidated. Nothing in this Court's Section 5 jurisprudence requires such a counter-intuitive result.

Although *Young* does not govern here, it does recognize an important limiting principle. There would be considerable artificiality with using a procedure as a relevant baseline for measuring retrogression if that procedure were so obviously unconstitutional that it was

immediately enjoined and never went into effect. Accordingly, Section 5 requires a procedure to have been "in force or effect." A proposal that never has the force of law or takes effect does not constitute a baseline under *Young*. By contrast, a law like Act No. 85-237, that was not only enacted but approved by a trial court and put into effect by an election, provides a relevant baseline, and treating it as such responds to the reality that judicial interpretations, no less than legislative or gubernatorial acts, can have a retrogressive effect.

C. Appellant's "State Sovereignty" Arguments Do Not Compel A Different Result

Appellant suggests (Br. 45-49) that the district court's decision impermissibly intrudes upon state sovereignty. That argument lacks merit.[2]

Appellant repeatedly complains (Br. 23-26) that the application of Section 5 in this case "strips state courts of their authority to decide pure-state law questions." That is incorrect. The district court made clear that, in requiring preclearance of the change from special elections to gubernatorial appointment, it was "in no way disputing the rulings of the Supreme Court of Alabama * * * or that the governors acted in accordance with state law in making the appointments" to the Mobile

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[2] To the extent that appellant and his *amici* attempt to cast doubt on the constitutionality of Section 5, those arguments are not properly presented. The arguments were not pressed or passed upon below, and for good reason. The District Court for the District of Columbia has exclusive jurisdiction over challenges to the constitutionality of Section 5. See 42 U.S.C. 1973*l*(b); *Allen*, 393 U.S. at 557-558. That court is currently considering a constitutional challenge to the reauthorization of Section 5. See *Northwest Austin Mun. Util. Dist. No. 1* v. *Mukasey*, No. 1:06-cv-1384. But this case presents no occasion to consider such a challenge.

County Commission. J.S. App. 8a. The district court was not called upon to determine whether the practices in place under Act No. 85-237 were legal under state law. It was required only to determine whether the election practices implemented by appellant were different from those previously in place. See *LULAC*, 995 F. Supp. at 726. That is a question of federal law and, as explained above, the district court correctly answered it.

Appellant therefore errs in suggesting that Section 5 subjects state supreme courts to the "insult" of having their "authoritative determinations of state law" reviewed by employees of the federal executive branch. Br. 40 (quoting *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 513 (2004) (Kennedy, J., dissenting)). To the contrary, by focusing federal officials on the baseline in "effect," as opposed to the baseline validly in effect, Section 5 avoids such second-guessing. As the Attorney General's letters denying preclearance with respect to the voting change in this case illustrate, see MDA App. 2a-8a, 9a-19a, in reviewing a voting change mandated by a state supreme court in a covered jurisdiction, the Attorney General (or the District Court for the District of Columbia in an appropriate case) does not review the court's interpretation of state law for correctness, but rather takes that motivation for a change as a given. The Attorney General determines only whether the change would discriminate against minority voters in violation of Section 5. See *id.* at 5a-6a, 15a-17a. If the Attorney General concludes that preclearance should be denied, he does not "overrule" the state court's interpretation of its own law in any respect. Rather, he simply determines that the requirements of a state law conflict with the requirements of Section 5. By virtue of the Supremacy Clause, Section 5 and its non-retrogression

requirement trump contrary provisions of a state law or a state constitution. See U.S. Const. Art. VI, Cl. 2. That effect was obvious and unproblematic when the VRA overrode state constitutional provisions and judicial decisions allowing practices like literacy tests, and it is no less true in a context like this.

In instances such as this, in which a voting practice currently in place is determined to violate state law, Section 5 will not always require the State to keep in place the particular practice found to be unlawful under state law. In many cases, Section 5 will merely restrict the range of remedies available to the State to cure the state-law deficiency, but the state will remain free to chose among the non-retrogressive options available under state law. Here, of course, the choice is binary: a vacancy can be filled either through an election or by an appointment. And the Attorney General concluded that Section 5 prevents state officials from implementing a change in state law from elections to appointment because, the Attorney General found, that change would have an impermissible retrogressive effect.

Appellant complains (Br. 46-47) that the application of Section 5 may force Alabama to hold elections under a statute that is invalid under state law. It is well-established, however, that failure to obtain Section 5 preclearance for a change affecting voting can justify "an injunction prohibiting the State from enforcing its election laws." *Allen*, 393 U.S. at 562-563. And until preclearance is obtained, courts may properly order covered jurisdictions to hold elections using procedures that are no longer authorized or valid as a matter of state law. See, *e.g.*, *Perkins*, 400 U.S. at 394-395; *In re McMillin*, 642 So. 2d 1336, 1337-1339 (Miss. 1994) (requiring elections to proceed under statutes that the state legislature

had repealed) (cited with approval in *Branch*, 538 U.S. at 262). This impact on state law is just a manifestation of preemption principles as applied to voting and the VRA. A covered jurisdiction could not resist application of Section 5 by insisting that elections without literacy tests or elections by ward are simply unauthorized by state law. The result should be no different here.

Appellant contends that the intrusion on state sovereignty inherent in Section 5 becomes intolerable where, as here, the state's highest court—"the 'ultimate expositor[]' of Alabama law"—is the entity that has mandated the voting change. Br. 46 (quoting *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975)). But as a matter of federalism, there is no logical justification for giving changes affecting voting greater deference if ordered by a state court than if mandated by the legislature (the State's ultimate lawmaking body) or the governor (the State's ultimate executive official). Appellant does not contend that a state legislature's repeal of a previously precleared statute is exempt from scrutiny under Section 5 (even, presumably, if the legislature acts out of a firmly-held, oath-driven view that the previous statute violated state law). But he fails to explain how requiring preclearance of the implementation of a state court decision invalidating a statute intrudes on state sovereignty to any greater degree than requiring preclearance of the decision of the legislature, with the concurrence of the governor, to repeal the same statute. And the discovery of such a new dimension of Our Federalism would directly undermine Section 5, since many of the problems leading to the passage of Section 5 were the product of state court decisions. See Appellees' Br. 4-7.

To be sure, some intrusion on state sovereignty is inherent in the Section 5 preclearance requirement,

which this Court has upheld as constitutional. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-335 (1966). As the Court has explained, "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however." *Lopez*, 525 U.S. at 284-285; see *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980). But nothing in the Constitution, this Court's precedents, or Section 5 justifies re-"split[ting] the atom of sovereignty," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), in a way that would require the federal courts—or for that matter the Attorney General—to accord greater respect to the decisions of state courts than they must to the decisions of state legislatures or state officials. And drawing such a distinction ultimately could erode, rather than reinforce, the important federalism principles established by this Court by creating an arbitrary line that lacks foundation in our Constitution's structure and history.[3]

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[3] Appellant also asserts (Br. 47) that the district court's decision allows the Attorney General to "commandeer[]" state officials in violation of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). But prohibiting a State from implementing one of its election laws is by no means "commandeering" within the meaning of *New York* or *Printz*. This Court has explained that "commandeering" involves "requir[ing] the States in their sovereign capacity to regulate their own citizens." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000). No violation of the anti-commandeering principle occurs where, as here, a federal statute regulates state activities "rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" *Id.* at 150 (quoting *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988)).

D. The District Court's Application Of Section 5 Does Not Make The Statute Unworkable

Finally, appellant argues (Br. 49) that continuing to interpret Section 5 to apply to changes that are mandated by state courts is "unworkable" and "unnecessary." It is neither. Appellant concedes (Br. 45) that voting changes resulting from state court decisions can be subject to preclearance under Section 5, because federal approval "is necessary to an election practice's enforceability" in order to prevent covered jurisdictions from evading the mandate of Section 5 by "'laundering' unprecleared practices through the courts." And the Attorney General has a longstanding and effective practice of reviewing changes mandated by state court decisions. A number of States charge their courts with responsibility for adopting various voting changes including annexations, de-annexations, redistricting plans, and special election schedules. For example, the Alabama Supreme Court was historically responsible for prescribing the form and content of the State's voter-registration form, see Act No. 2006-570, 2006 Ala. Laws 1331, amending and renumbering Ala. Code § 17-4-122 (LexisNexis 2005) as § 17-3-52 (LexisNexis 2007), and the changes it ordered were subject to preclearance, see, *e.g.*, Letter from Joseph D. Rich, Acting Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Lynda K. Woodall, Assistant Att'y Gen., State of Alabama (Apr. 18, 2000) (declining to interpose objection to revised "Alabama Voter's Update Form" adopted by Alabama Supreme Court). In addition, the Attorney General has reviewed hundreds of changes resulting from state court decisions in Virginia and Mississippi approving annexations. See, *e.g.*, *City of Richmond* v. *United*

States, 422 U.S. 358 (1975); Va. Code Ann. § 15.2-3202 (LexisNexis 2003); Miss. Code Ann. § 21-1-29 (West 1999).

The Attorney General has also reviewed numerous redistricting plans formulated by state courts. See, *e.g.*, Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Knox V. Jenkins, Jr., Senior Resident Judge, Superior Ct. of Johnston County, N.C. (July 12, 2002) (declining to interpose an objection to redistricting plans for state legislature adopted by state court); Letter from James P. Turner, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Jimmy Evans, Attorney Gen., State of Alabama (July 23, 1993) (same); Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Robert A. Butterworth, Attorney Gen., State of Florida (Aug. 12, 1992) (same); Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Daniel E. Lungren, Attorney Gen., State of California (Feb. 28, 1992) (same). And he has reviewed a number of changes in election dates resulting from state court orders. See, *e.g.*, Letter from Bill Lann Lee, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to T.H. Freeland IV, Freeland & Freeland (Aug. 17, 1998) (objecting to cancellation of municipal election in Grenada, Mississippi, ordered by Mississippi Supreme Court); Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Virginia B. Ragle, Assistant Att'y Gen., State of Alaska (July 8, 1992) (declining to interpose an objection to delay of an election ordered by Alaska state courts).

In addition, this is hardly the first time that the Attorney General has reviewed a change affecting voting

resulting from a court decision interpreting state law. For example, the Attorney General reviewed the change resulting from the Mississippi Supreme Court's decision in *Myers* v. *City of McComb*, 943 So. 2d 1 (Miss. 2006), which interpreted the Mississippi Constitution to prohibit a person from simultaneously serving as a city selectman and a state representative. See Letter from John Tanner, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Reese Partridge, Assistant Att'y Gen., State of Mississippi (July 26, 2007). That change was submitted for preclearance in response to a federal court order rejecting the city's argument that the state court's decision did not result in a change affecting voting because it "merely interpreted a constitutional provision in effect long before the VRA become effective." *Myers* v. *City of McComb*, No. 3:05-CV-00481 (S.D. Miss. Nov. 23, 2005), slip op. 5-6 (three-judge court). In another case, the Attorney General reviewed changes in the procedures used by counties in Alabama to count absentee ballots mandated by the Alabama Supreme Court's decision in *Williams* v. *Lide*, 628 So. 2d 531 (Ala. 1993). See Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Mark Givhan, Deputy Att'y Gen., State of Alabama (Nov. 22, 1994).

There is therefore no reason to give credence to appellant's suggestion (Br. 49) that recognizing that Section 5 covers changes affecting voting that result from the decisions of state courts will alter the course of Section 5 enforcement, much less result in a flood of litigation. Section 5 has been interpreted to apply to such changes for more than a quarter of a century—at least since this Court's 1982 decision in *Hathorn*.

Nor is there merit to the suggestion (Br. 50) that Congress would have seen "no overriding *need*" to apply Section 5 to changes resulting from state court decisions. Congress enacted the VRA "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. at 308. Central to that goal is Section 5's requirement that "*all* voting changes * * * includ[ing] voting changes mandated by order of a state court" be submitted for preclearance. *Branch*, 538 U.S. at 262. History demonstrates the wisdom of Congress's decision to create such a broad remedy: Shortly after the enactment of the VRA, a federal district court had to enjoin Alabama circuit courts from interfering with the implementation of the VRA. *Reynolds* v. *Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965) (per curiam) (three-judge court). Moreover, the decisions of state court judges—who in Alabama, as in many other States, are elected by the people—can reflect the "policy choices of the elected representatives of the people" just as much as the decisions of state legislators. *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981). Such choices—Congress explicitly mandated in Section 5 and this Court has held—must be precleared in covered jurisdictions like Alabama. *Ibid.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HONORABLE BOB RILEY,
as Governor of the State of Alabama,
Appellant,

—v.—

YVONNE KENNEDY, JAMES BUSKEY &
WILLIAM CLARK,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF ALABAMA IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a, nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of that goal, the ACLU has long been active in defending the equal right of racial and other minorities to participate in the electoral process. The ACLU has appeared before this Court in numerous voting cases over the years, including those seeking to enforce the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, *e.g.*, *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222 (1985), *Holder v. Hall*, 512 U.S. 874 (1994), and *Abrams v. Johnson*, 521 U.S. 74 (1997), both as direct counsel and as *amicus curiae*. The ACLU of Alabama is a statewide affiliate of the national ACLU.

INTRODUCTION

This case presents the question whether the decision of the Governor of Alabama to fill a vacancy on the Mobile County Commission by appointment rather than by special election is a voting change

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief was granted by the parties who have filed blanket letters of consent with the Court.

requiring preclearance under Section 5 of the Voting Rights Act. Although the filling of the vacancy by special election had been authorized by a local law passed by the state legislature and precleared under Section 5, Appellant contends the appointment was not a covered change because it was based upon decisions of the state supreme court that filing a vacancy by special election was in violation of the Alabama Constitution. The district court disagreed and held the appointment was a covered change and enjoined its implementation absent compliance with Section 5. J.S.App. 3a.

Amici will address primarily the administration of Section 5 by the Department of Justice, the legislative history of Section 5, and the state's various federalism arguments, including its advocacy of "conditional preclearance."

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act requires preclearance of all changes in voting, including those implemented pursuant to state court orders interpreting state law. The distinction Appellant seeks to draw between a state court's exercise of a "political function," which it concedes is subject to Section 5, and a "core judicial duty," which it argues is not, is unwarranted based on the facts of this case and has been rejected by the decisions of this Court and lower federal courts. Any change in voting that affects "[t]he power of a citizen's vote" is subject to Section 5, whether it is implemented pursuant to an act of the legislature or a decision of a state court. *Allen v. State Board of Elections*, 393 U.S. 544, 569

(1969). The distinction urged by Appellant should be rejected for the further reason that it is "inherently standardless" and incapable of meaningful application. *Holder v. Hall*, 512 U.S.at 885.

The administration of Section 5 by the Department of Justice and the legislative history of Section 5 also show that preclearance is required for changes in voting implemented pursuant to state court orders. The Attorney General has interposed numerous objections to voting changes implemented as a result of court orders invalidating state election procedures or pursuant to consent decrees. These objections letters were made part of the congressional record when Congress amended and extended the Voting Rights Act in 2006, and Congress based its finding of the continued need for Section 5 on, *inter alia*, the "hundreds of objections interposed . . . by the Department of Justice since 1982." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577, Sec. 2(b)(4)(A). Congress similarly approved the application of Section 5 to electoral changes implemented by state courts when it extended Section 5 in 1975, Public Law 94-73, 89 Stat. 400, and recognized that state court litigation can lead to court ordered changes that require preclearance when it extended Section 5 in 1982. *See* p.17, *supra*.

Based on this legislative, judicial, and administrative history, this Court should reject Appellant's proposed, and totally unprecedented, "contingent preclearance" rule. It is fundamentally inconsistent with Section 5 and would allow covered

jurisdictions essentially to take a state court appeal from a precleared voting change.

Section 5, which has repeatedly been held constitutional by this Court, was designed to halt retrogression in minority voting strength without regard for the legality under state law of a practice in force or effect. State law cannot be the ultimate arbiter of Section 5 or federal law in general. And given the action of the Alabama legislature restoring the authority to fill vacancies to the voters for future lections, there is no merit to Appellant's argument that Section 5 requires the state to maintain a practice that violates state law.

Appellant's "Pandora's Box" and undue burden arguments are equally without merit. Since voting changes implemented pursuant to state court orders have always been held subject to Section 5, there is no Pandora's Box to open. Defenses based upon undue burden, or laches, have been consistently rejected by the courts, which have correctly understood that allowing such defenses would reward a jurisdiction's long failure to comply with Section 5, and would do what Section 5 was designed to forbid, *i.e.*, allow the burden of litigation and delay to operate in favor of the perpetrators and against the victims of possibly discriminatory practices. Finally, there is no evidence of existing unprecleared state court decisions in Alabama affecting voting or that complying with Section 5 would in fact be burdensome.

ARGUMENT

I. VOTING CHANGES IMPLEMENTED PURSUANT TO STATE COURT ORDER HAVE CONSISTENTLY BEEN HELD SUBJECT TO SECTION 5

One of Appellant's principal arguments is that the district court's application of Section 5 to voting changes implemented pursuant to a state court order interpreting state law "works an unprecedented expansion of that statute's already-broad scope." Brief for Appellant, p. 2.[2] The contention is patently incorrect.

As Appellees have pointed out in their brief, a unanimous Court in *Branch v. Smith*, 538 U.S. 254, 262 (2003), held that Section 5 "requires preclearance of *all* voting changes, . . . and there is no dispute that this includes voting changes mandated by order of a state court." (Citations omitted.) The voting change requiring Section 5 preclearance in *Branch* was a redistricting plan drawn by a Mississippi chancery court reapportioning the state's congressional districts. 538 U.S. at 260. Appellant seeks to distinguish *Branch* by arguing that while a state court's exercise of a "political function" is subject to Section 5, "an exercise of the core judicial duty" is not. Brief for Appellant, p. 44. The distinction is not only unwarranted based on the facts of this case, but is incapable of meaningful application.

It is difficult to see how the drawing of a

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[2] *See also* Brief for Appellant, p. 27 ("this case arises . . . far outside the ordinary course of §5 business").

congressional reapportionment plan by a state court, which Appellant concedes is subject to Section 5, is not a "core judicial duty." Courts routinely draw interim redistricting plans when a state legislature, for whatever reasons, fails to do so. And in enforcing the one-person, one-vote protection of the Fourteenth Amendment, the courts are plainly exercising a "core judicial duty." As *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964), expressly holds, a court ordered reapportionment to comply with the constitution is "an appropriate and well-considered exercise of judicial power." This Court has often noted, therefore, that "state courts have a significant role in redistricting," *Growe v. Emison*, 507 U.S. 25, 33 (1993), and that "the power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the State in such cases has been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409 (1965).[3]

It is equally difficult to see how a state court's invalidation of an election to fill a vacancy on a county commission is not a "political function," which

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[3] The constitution of South Dakota, for example, imposes upon the state supreme court the judicial duty to make an apportionment should the state legislature fail to do so "by December first of the year in which apportionment is required." Article III, Section 5 of the South Dakota Constitution. *See also In re Certification of a Question of Law from U.S. Dist. Court, Dist. of South Dakota*, 615 N.W.2d 590, 595 (S.D. 2000) (noting that "[i]n 1982, the voters of this State transferred the duty of apportionment, if not performed by the Legislature, to this Court"). As is apparent, when the state supreme court performs apportionment, it is exercising a judicial duty imposed upon it by the voters of the state.

Appellant concedes would be covered by Section 5. Indeed, in *Allen v. State Board of Elections*, 393 U.S. at 544, the Court held that an amendment to state law changing an office from elected to appointed was covered by Section 5 because "[t]he power of a citizen's vote is affected by this amendment." A similar change implemented pursuant to a state court order would have no less affect upon the power of a citizen's vote, nor should it be exempted from Section 5 on the pretext that it was based upon a court's exercise of a "core judicial duty."

Court's routinely exercise their judicial duties in ways that have political consequences. In *Gray v. Sanders*, 372 U.S. 368, 380-81 (1963), for example, the Court invalidated Georgia's county unit system, which gave a disproportionate political advantage in redistricting to rural counties. And in *Smith v. Allwright*, 321 U.S. 649, 666 (1944), the Court struck down the exclusion of blacks from voting in Democratic primaries in Texas, which had a direct impact on the political participation of both blacks and whites. There is no rational or principled basis upon which Appellant can characterize a court drawn reapportionment as a "political function" covered by Section 5, but a court order changing an office from elected to appointed as a "core judicial duty" exempt from preclearance. The impact upon political participation and the power of a citizen's vote is apparent and direct in both instances.

This Court has also rejected the use of statutory constructions that are "inherently standardless." *See Holder v. Hall*, 512 U.S. at 885 (rejecting a Section 2 challenge to a sole commissioner form of county government because the

"wide range of [replacement] possibilities makes the choice 'inherently standardless'"). The political function/core judicial duty construction of Section 5 urged by Appellant here is equally standardless and should be rejected as well. What is relevant and dispositive under Section 5 is whether state action has an impact on voting and participation in the political process. Because the implementation of the state court orders in this case has such an impact, it is covered by Section 5.

Branch v. Smith, as Appellees make clear in their brief, is consistent with prior decisions of this Court, as well as decisions of lower federal courts. In *LULAC v. Texas*, 995 F.Supp. 719 (W.D. Tex. 1998), a case virtually identical to this one, the court enjoined the State of Texas from implementing a voting change resulting from a decision of the state supreme court until the change received preclearance under Section 5. *See State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 491 (Texas 1996). The state court decision altered the practice and procedure for filling the vacancy left by a judge who prospectively resigned prior to the expiration of his elected term. The preexisting procedure required an interim election to fill the vacancy. The decision of the state supreme court, based upon its interpretation of the state constitution, changed that by providing for gubernatorial appointment followed by an election at the time of the next regularly scheduled general election. In arguing that the change from an elected to an appointed office was not covered by Section 5, the state made the same argument that Appellant makes here, that "§ 5 is inapplicable because the contested change resulted

from a court decision rather than from a legislative or administrative act." *LULAC v. Texas*, 995 F.Supp. at 724. The court rejected the argument, *id.* at 724-25, relying upon *Hathorn v. Lovorn*, 457 U.S. 255, 266 n.16 (1982) ("the presence of a court decree does not exempt the contested change from § 5").

As *LULAC* further points out, the change in the method of filing vacancies, if enacted by the legislature, would require § 5 preclearance. Accordingly, "[w]e see no reason why such a change . . . should not also require preclearance if it resulted from a state court opinion." 995 F.Supp. at 725. As this Court has likewise held, "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 170 (1985).

The only exception recognized by the Court to the requirement that voting changes embodied in court orders are subject to Section 5 are redistricting plans "wholly court-developed" by a federal court, and "voting changes embodied in federal-court orders." *Lopez v. Monterey County*, 525 U.S. 266, 287 (1999). *Accord, Abrams v. Johnson*, 521 U.S. at 95 "[t]he exception applies to judicial plans, devised by the court itself, not to plans submitted to the court by the legislature of a covered jurisdiction in response to a determination of unconstitutionality").

Voting changes implemented pursuant to state court orders, including those interpreting state law, are subject to Section 5.

II. THE ADMINISTRATION OF SECTION 5 AND ITS LEGISLATIVE HISTORY BOTH SHOW THAT PRECLEARANCE IS REQUIRED FOR CHANGES IN VOTING IMPLEMENTED PURSUANT TO STATE COURT ORDERS

Appellant further asserts that "[a]ll relevant sources . . . refute the district court's novel interpretation [of Section 5]." Brief for Appellant, p. 24. Again, the assertion is incorrect. The administration of Section 5 by the Department of Justice and the legislative history of the Voting Rights Act both show that preclearance is required for changes in voting implemented pursuant to state court orders relying upon or interpreting state constitutional law.

For example, following the decision in *LULAC v. Texas* discussed above, the state sought preclearance in 1998 of the change in filling prospective vacancies in judicial office from election to gubernatorial appointment "as a result of the state supreme court's interpretation of Texas' constitution in *State of Texas ex rel. Angelini v. Hardberger*, 932 S.W.2d 489 (Texas 1996)." *See* Letter from Bill Lann Lee, Acting Assistant Attorney General, to Alberto R. Gonzales, Secretary of State, September 29, 1998, p. 1. Under the new procedure sought to be precleared, "an interim appointment will be made by the governor, and the appointed judge will serve until the next succeeding general election." *Id.*

The Attorney General objected to the change on the ground that it would have a discriminatory effect. He concluded that because voting was often

polarized along racial lines, voters in districts with significant Hispanic populations "will not have an opportunity to participate in the selection of judges under the new system similar to the opportunity they have under the current system." *Id.* at 2. He also concluded that in making a recent judicial appointment the governor had not sought input from Hispanic voters about potential judicial appointees. That failure was "illustrative of the effect the proposed change may have on the participation opportunities of Hispanic voters." *Id.*

Notably, however, the Attorney General held that since the purpose of Section 5 was to avoid retrogression in "minority participation opportunities," nothing "precludes the state from adopting a procedure for filling prospective judicial vacancies by gubernatorial appointment," so long as "any appointment procedure that is used . . . provide[s] minority participation opportunities." *Id.* Thus, under Section 5 a jurisdiction may adopt whatever election procedures it wishes, even a procedure that the Attorney General has previously declined to preclear, as long as it does not cause a retrogression in minority voting strength.[4]

Another instance of a covered jurisdiction seeking to implement a change in voting pursuant to a state court order articulating state law involved the Town of Kilmichael, Mississippi. The town, which

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[4] The Attorney General did in fact subsequently preclear the change involved in *LULAC v. Texas* "based on the additional information" submitted by the state. Letter from Bill Lann Lee, Acting Assistant Attorney General, to Alberto R. Gonzales, Secretary of State, October 21, 1998.

was historically majority white, elected its mayor and five member board of aldermen at-large. The 2000 census, however, showed that the black population had increased and was now 52.4% of the population. For the first time in its history, blacks were a majority of the town's registered voters and a significant number of black candidates qualified for the 2001 general election. At the request of the town a state circuit court cancelled the election, ostensibly so that the town could develop a new system of single member districts. *See* Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to J. Lane Greenlee, Esq., December 11, 2001, p. 2, citing *In the Matter of the General Election for Mayor and Aldermen of the Town of Kilmichael of June 2001*, Case No. 2001-0073CV-L (Cir. Ct. Montgomery Cty. Miss. May 21, 2001). In its decision, the state court relied in part upon the constitution, *i.e*, "that there is a substantial risk of the violation of constitutional rights of the voters of the Town of Kilmichael, Mississippi should the scheduled elections go forward." *Id.*, slip op. at 2.

The town submitted the court ordered cancellation of the election for preclearance under Section 5 but the Attorney General objected. He concluded "the town has not established that its decision was motivated by reasons other than an intent to cause retrogression in minority voting strength." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to J. Lane Greenlee, Esq., December 11, 2001, p. 2. The board "did not focus on changing the method of election until it became clear that the minority community potentially could win the mayoral seat as well as four of the five aldermanic seats." *Id.* at 3. The Attorney General

also concluded the change had a discriminatory effect because it denied blacks "the opportunity to attempt to elect candidates of their choice." *Id.*

In administering Section 5, the Attorney General has interposed numerous objections to voting changes implemented as a result of court orders invalidating state election procedures or pursuant to consent decrees. *See, e.g.* Letter from John R. Dunne, Assistant Attorney General, to Jimmy Evans, Attorney General, March 27, 1992 (objecting to Alabama's congressional redistricting plan proposed pursuant to a court order).[5] Carving

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[5] For other similar objection letters, *see* Drew S. Days III, Assistant Attorney General, to George E. Glaze, City Attorney, December 9, 1977 (objecting to a redistricting plan submitted by College Park, Georgia, as the result of a court order); Wm. Bradford Reynolds, Assistant Attorney General, to R. Bruce Warren, July 23, 1984 (objecting to a redistricting plan submitted by Thomas County, Georgia, as the result of a court order); James P. Turner, Acting Assistant Attorney General, to Ken W. Smith, November 13, 1989 (objecting to majority vote, numbered posts, and staggered terms submitted by Lumber City, Georgia, pursuant to a consent decree); John R. Dunne, Assistant Attorney General, to Michael E. Hobbs, Senior Assistant Attorney General, March 11, 1991 (objecting to a change in the method of selecting a school board submitted by Georgia pursuant to a consent decree); James P. Turner, Acting Assistant Attorney General to Alex Davis, June 25, 1993 (objecting to a majority vote requirement for mayor submitted by Butler, Georgia, pursuant to a consent decree); J. Stanley Pottinger, Assistant Attorney General, to John Ward, December 24, 1975 (objecting to reapportionment plans submitted by Rapides Parish, Louisiana, pursuant to a court order); Wm. Bradford Reynolds, Assistant Attorney General, to Wayne Hatcher, December 20, 1982 (objecting to reapportionment plans submitted by LaSalle Parish, Louisiana, one of which had been approved by the court); James P. Turner, Acting Assistant Attorney General, to Harry A. Rosenberg, November 17, 1989

out an exception to preclearance for changes implemented pursuant to state court orders, including those interpreting state constitutional law, would be contrary to the established administration of Section 5 by the Department of Justice. It would also be contrary to the legislative history and the intent of Congress, which has approved the Department's administration of the statute.

When it amended and extended the Voting Rights Act in 2006, Congress had before it evidence that retrogressive changes in voting implemented pursuant to state court orders, including those

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(objecting to a redistricting plan submitted by Jefferson Parish, Louisiana, pursuant to a court order); Deval L. Patrick, Assistant Attorney General, to E. Kay Kirkpatrick, August 12, 1996 (objecting to a congressional redistricting plan submitted by Louisiana as the result of a court order); J. Stanley Pottinger, Assistant Attorney General, to William O. Semmes, March 30, 1976 (objecting to a redistricting plan submitted by Grenada County, Mississippi, pursuant to a court order); Wm. Bradford Reynolds, Assistant Attorney General, to Donald B. Patterson, July 5, 1983 (objecting to a redistricting plan submitted by Lincoln County, Mississippi, which had been approved by the court); Wm. Bradford Reynolds, Assistant Attorney General, to Francis Vining, January 3, 1984 (objecting to a redistricting plan submitted by Lawrence County, Mississippi, pursuant to a court order); James P. Turner, Acting Assistant Attorney General, to John P. Fox, February 27, 1990 (objecting to a redistricting plan submitted by Chickasaw County, Mississippi, pursuant to a court order); John R. Dunne, Assistant Attorney General, to Jack N. Thomas, April 26, 1991 (objecting to a redistricting plan submitted by Monroe County, Mississippi, pursuant to a court order); James P. Turner, Acting Assistant Attorney General, to Roy D. Bates, February 2, 1990 (objecting to a proposed election schedule submitted by Bennettsville, South Carolina, pursuant to a consent judgment and decree).

interpreting state constitutional and statutory law, had drawn Section 5 objections. Bradley J. Schlozman, Acting Assistant Attorney General, testified before the House of Representatives, and introduced copies of Section 5 objection letters issued by the Department of Justice from 1980 through October 17, 2005. *See* Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 109th Cong., 1st Sess., October 25, 2005, Testimony of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, pp. 8, 225 (Appendix to the Statement of Bradley J. Schlozman: Copies of Objection Letters, by State, in which the Attorney General interposed an objection under Section 5 from 1980 through the present (October 17, 2005), including some letters responding to requests to reconsider an objection and some letters withdrawing objections).

Included in the letters submitted to Congress were: the 1998 objection to the voting change implemented pursuant to an order of the state supreme court involving the filling of vacancies in judicial office in Texas; the 2001 objection to the cancellation of an election in Kilmichael, Mississippi, pursuant to a state court order; and the objections from 1980 through October 17, 2005, cited at p. 13 n.5 of this Amicus Brief. *See* Hearings Vol. I, pp. 1616-19 (2001 Kilmichael objection letter); Hearings Vol. II, pp. 2496-99 (1998 Texas objection letter); Hearings Vol. I, pp. 385, 607, 670, 678, 735, 867, 907, 1119, 1227, 1268, 1388, 1402, and Vol. II, p. 1957

(objections from 1980 through October 17, 2005).

Congress was thus aware that objections had been entered to voting changes implemented pursuant to state court orders interpreting state law, and necessarily endorsed that application of Section 5 when it extended the statute for an additional 25 years. As the Act provides, evidence of the continuing need for Section 5 included, *inter alia*, "the hundreds of objections interposed . . . by the Department of Justice since 1982." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577, Sec. 2(b)(4)(A). This Court has held that "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 134 (1978). *Accord, Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 576-77 (1977) (the "administrative construction [of a reenacted statute] may be said to have received congressional approval"). This Court has further held that any doubt that voting "changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference." *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178-79.

Congress also approved the application of Section 5 to electoral changes implemented by state courts when it extended Section 5 in 1975. As the Senate report specifically explains in an illustrative example, when a court holds an apportionment plan

unconstitutional,

> the court will either direct the governmental body to adopt a new plan and present it to the court for consideration or else choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of - or selection among - any plans presented to it until such times as these plans have been submitted for Section 5 review.

S.Rep. No. 94-295, 94th Cong., 1st Sess. 18 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 784.

The 1981 House Report likewise recognized that state court litigation can lead to court-ordered changes that require preclearance by noting that "although the Department lacks an independent mechanism to monitor voting changes, the Attorney General has attempted to use several methods to identify unsubmitted changes including the existing preclearance process, unsolicited notification of changes from aggrieved persons, and review of voting rights litigation by private parties." H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 13 (1981).

III. APPELLANT'S PROPOSAL FOR "CONTINGENT PRECLEARANCE" SHOULD BE REJECTED BY THIS COURT

Appellant has asked this Court to adopt a new and totally unprecedented "contingent preclearance"

rule for Section 5. Under Appellant's proposal, the state "would recognize 'contingent preclearance' such that enactment and preclearance are sufficient to render a State law enforceable, unless and until the State law is held unconstitutional. At that point, the law would be void, and the preclearance letter would be of no effect." Brief In Opposition to Motion to Dismiss or Affirm, p. 8. "Contingent preclearance" would allow covered jurisdictions essentially to take a state court appeal from a precleared voting change.

For example, a state court could hold a precleared single member district plan adopted by a city to provide minority voters an equal opportunity to elect candidates of their choice to be in violation of state constitutional law prohibiting the splitting of any precincts in redistricting. If the preclearance were merely contingent, the city could return to its prior at-large, and discriminatory, system of elections which did not split precincts. Such a result would seriously impair Section 5, which was enacted to insure that no changes in voting are made that would lead to a retrogression in minority voting strength.

To give another example, a city, prior to its coverage by Section 5, could have required racial segregation at the polls. After its coverage, it could have adopted an ordinance prohibiting segregated polling places and gotten the change precleared. A law suit could later be brought that the ordinance violated general state law prohibiting municipal election ordinances regulating polling places. If the state's contingent preclearance rule were in effect, the city would revert to segregated polling places free and clear of Section 5.

Contingent preclearance is fundamentally at odds with Section 5, and would provide covered jurisdictions an end run around the preclearance requirement. The suggestion that this Court should adopt contingent preclearance should be rejected.

IV. APPELLANT'S FEDERALISM ARGUMENTS ARE WITHOUT MERIT

Appellant contends that the "federalism implications" of allowing implementation of a precleared voting change, despite a subsequent finding by a state court that the practice is unconstitutional under state law, "are profound" because it "strips state courts of their authority to decide pure state-law questions." Brief for Appellant, p. 23. First, whether a change in voting is retrogressive is not a pure state law question but a question of federal law under Section 5.

Second, as this Court has held, "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practice already in effect." *City of Lockhart v. United States*, 460 U.S. 125, 133 (1983). *Accord, Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971) (retrogression is measured by the actual practice in effect, even if it is in violation of state law); *Young v. Fordice*, 520 U.S. 273, 283 (1997) (the "fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never 'in force or effect'"). A contrary rule would be inconsistent with the basic purpose of Section 5, which "has always been to insure that no voting-procedure changes would be made that would lead to

a retrogresion in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

Appellant attempts to carve out an exception to the rule in *Lockhart* and *Perkins* by relying upon *Abrams v. Johnson*. The reliance is misplaced. In *Abrams*, the Court rejected as a benchmark for Section 5 review a Georgia congressional redistricting plan it found violated the federal - not the state - constitution. The Court concluded that "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." 521 U.S. at 97. *Accord, Miller v. Johnson*, 515 U.S. 900, 909, 928 (1995) (invalidating congressional redistricting in Georgia as violating the Fourteenth Amendment despite its having been precleared under Section 5); *Bush v. Vera*, 517 U.S. 952, 957 (1996) (finding unconstitutional congressional redistricting in Texas despite the fact it had been precleared under Section 5). In *Abrams*, the Court used as a benchmark the constitutional, and precleared, plan that had been adopted in 1982. But nothing in *Abrams* or the other decisions of this Court hold or suggest that changes in voting implemented pursuant to orders of state courts are not subject to Section 5. A contrary rule would be in violation of these decisions and undermine the very purpose of Section 5.

The State's reliance upon *Young v. Fordice* is also misplaced. There, the Court held a Provisional Plan to implement the NVRA could not serve as the Section 5 benchmark because the plan "was not 'in force or effect'; hence it did not become part of the baseline against which we are to judge whether

future change occurred." *Id.* at 283. The Court concluded that even though the plan had been precleared, it

> was used to register voters for only 41 days, and only about a third of the State's voter registration officials had begun to use it. Further, the State held no elections prior to its abandonment of the Provisional Plan, nor were any elections imminent. These circumstances taken together lead us to conclude that the Provisional Plan was not 'in force or effect.'

Id.

Here, by contrast, Act No. 85-237 was enacted in 1985, was fully implemented, and an election was held under the act two years later in 1987. Moreover, the state supreme court denied a request for a stay pending appeal in *Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988), which allowed the election to go forward. Brief for Appellant, p. 8. Unlike the Provisional Plan in *Young*, Act No. 85-237 was in "force or effect." The subsequent state court orders were thus changes in voting practices or procedures within the meaning of *Young* and Section 5.

State law, moreover, cannot be the ultimate arbiter of Section 5 or federal law in general. Many states, for example, required racially segregated schools as a matter of state constitutional law. *Brown v. Board of Education*, 347 U.S. 483, 486 n.1 (1954) (noting that South Carolina, Virginia, and Delaware required racial segregation in public schools as a matter of state constitutional and

statutory law). It would hardly be constitutionally suspect for a court to enjoin the practice of segregated schools as a violation of federal law, despite the fact that integrated schools were unconstitutional under state law. Similarly, as of 1967, Virginia and 15 other states outlawed interracial marriage as a matter of state legislative or constitutional law. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967). It was not constitutionally suspect for the Court to invalidate Virginia's anti-miscegenation laws, which not only voided interracial marriage but made it a felony, as a violation of the Fourteenth Amendment.

It is no more constitutionally suspect for a voting change to be precleared under Section 5 and implemented, despite the fact that the change might subsequently be found unconstitutional under state law. State law does not override Section 5 or other federal laws. As the Court held in *Hillsborough County, Fla. v. Auto. Med. Labs*, 471 U.S. 707, 712 (1985), "[i]t is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law. *Gibbons v. Ogden*, 9 Wheat 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.)."

Appellant's argument that Section 5 requires a state "to keep in place . . . practice[s] held invalid under state law," Brief for Appellant, p. 16, is also contradicted by the evidence in this case. There is in fact no inconsistency now between the state's practice of filing vacancies on the Mobile County Commission and the Section 5 objection. As Appellant concedes, "[i]n 2006, the Alabama

Legislature adopted Act No. 2006-342, which provides that on a going-forward basis, vacancies on the Mobile County Commission will be filled through special election." Brief for Appellant, p. 9 n.5. The Act was signed by the governor on April 12, 2006, legislatively reversing the decisions in this case and *Stokes v. Noonan, supra,* and restoring the authority to fill vacancies to the voters themselves for future elections. Act No. 2006-342 was submitted for preclearance, but the Attorney General said it was not a change in voting for which preclearance was required. *See* Letter from Wan J. Kim, Assistant Attorney General, to Mr. Troy King, Attorney General, January 8, 2007, p. 3.

Given the recent action by the Alabama legislature, Appellant's argument that Section 5 requires Alabama to maintain practices that violate state law is obviously erroneous.

V. APPELLANT'S "PANDORA'S BOX" AND UNDUE BURDEN ARGUMENTS ARE WITHOUT MERIT

Appellant argues that requiring preclearance of state court decisions affecting voting "would open up a Pandora's box of possible challenges and would risk destabilizing the decisional law of all sixteen §5 jurisdictions." Brief for Appellant, p. 49. The argument ignores the fact that such changes have always been subject to Section 5. There is no Pandora's box to open.

More important, no jurisdiction is entitled to continue to violate Section 5 based on the theory that it would be harmed or burdened by compliance.

Indeed, the very purpose of Section 5, which has been repeatedly held constitutional by this Court, was "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Appellant's further suggestion that litigation under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, is an adequate substitute for Section 5 is flatly contradicted by both the decisions of this Court and the legislative history. *Id.* ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits").

In *Dotson v. City of Indianola*, 514 F.Supp. 397, 400 (N.D. Miss. 1981), *aff'd*, 456 U.S. 1002 (1982), an action to enforce Section 5, the defendant raised a laches defense essentially identical to the one raised by Appellant here, *i.e.*, the city would be unduly prejudiced or harmed by having to comply with preclearance. In rejecting the contention, the three-judge court held a laches defense: "would frustrate the remedial purposes of the Act;" "would transform [the city's] own long failure to comply with the duty imposed by Section 5 into a defense;" and "would be to do precisely what § 5 was designed to forbid: allow the burden of litigation delay to operate in favor of the perpetrators and against the victims of possibly racially discriminatory practices. *Berry v. Doles*, 438 U.S. 190, 194 (1978) (Brennan, J., concurring)." *Dotson*, 514 F.Supp. at 401. The court also held that the duty to seek preclearance "arises

anew each time the defendant enacts or seeks to administer an uncleared voting regulation." *Id.* Decisions of other courts in voting rights cases are to the same effect. *See, e.g., United States v. Louisiana*, 952 F.Supp. 1151, 1177 (W.D. La. 1997) (rejecting laches as a defense in an action to enforce Section 5 because "its application would frustrate Congress's purpose in enacting federal legislation"), *aff'd*, 521 U.S. 1101 (1997); *Shuford v. Alabama State Bd. of Educ.*, 920 F.Supp. 1233, 1240 (M.D. Ala. 1996) (same); *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (rejecting a laches defense in a Section 2 challenge to at-large elections "[b]ecause of the ongoing nature of the violation"); *Smith v. Clinton*, 687 F.Supp. 1310, 1313 (E.D. Ark. 1988) ("the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held under the multimember structure"), *aff'd*, 488 U.S. 988 (1988); *Blackmoon v. Charles Mix County*, 386 F.Supp.2d 1108, 1114 (D. S.D. 2005) (rejecting a laches defense where plaintiffs alleged that "each new election held under the existing districts violates their constitutional rights and Section 2 of the Voting Rights Act").

Although Appellant cites no evidence of existing unprecleared Alabama state court decisions affecting voting, compliance with Section 5 would not in fact impose a "staggering" burden, nor risk "destabilizing the decisional law" of covered jurisdictions. Brief for Appellant, pp. 49-50. The recent experience in South Dakota illustrates that even where there are hundreds of unsubmitted voting changes, the preclearance process is entirely manageable.

Two counties in South Dakota, Todd and Shannon, were covered by Section 5 as a result of the 1975 amendments of the Voting Rights Act. Despite that, the state enacted more than 600 changes in voting affecting the two counties, but failed to submit them for preclearance. The state was sued for its failure to comply, and entered into a consent decree in December 2002, in which it agreed to develop a comprehensive plan "that will promptly bring the state into full compliance with its obligations under Section 5." *Quick Bear Quiver v. Hazeltine*, No. 02-5069 (D. S.D. Dec. 27, 2002) (three-judge court), slip op. at 3. The state made its first submission in April 2003, and began a process that was completed three years later. As with South Dakota, if there are any unprecleared voting changes in Alabama that are being implemented pursuant to state court orders, they should be submitted for preclearance. And as in South Dakota, with its 600 plus voting changes, the burden of complying with Section 5 would neither be "staggering" nor "destabilizing."

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA, APPELLANT

v.

YVONNE KENNEDY, *ET AL.*, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE STATES OF FLORIDA, SOUTH CAROLINA, ALASKA, LOUISIANA, NEW HAMPSHIRE, NEW MEXICO, SOUTH DAKOTA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, should be interpreted to require covered States, counties, and municipalities to obtain preclearance from the Federal government before implementing state court decisions that interpret or otherwise impact state laws affecting voting.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Under the decision below, any State or other jurisdiction covered in whole or in part by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, must now ask the United States Department of Justice for permission to enforce a decision of a state court—even the state supreme court—that interprets or otherwise affects any state law that implicates voting. And, as the appellees admit, where the Department of Justice *denies* preclearance—as it did here—the State's executive branch will now be required to "keep in place a practice held invalid under state law" by the States' own courts. Mot. to Dismiss or Affirm 23. Accordingly, while Section 5 obviously altered the relationship between the State and Federal governments, under the decision below it now intrudes markedly into the relationship between the executive and judicial branches *within* a State's government. This is a remarkable expansion of Section 5.

This expansion, moreover, will impose significant additional burdens on all sixteen States that are covered in whole or in part by Section 5. Nine States—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—are wholly "covered jurisdictions" for purposes of Section 5. See 28 C.F.R. Pt. 51, App. Another seven States—California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota—contain counties or municipalities that are covered jurisdictions. See *ibid.* Although the latter States are not themselves covered by Section 5, their statutes and regulations are subject to preclearance requirements to the extent that they affect voting in covered counties or municipalities. See *Lopez* v. *Monterey County*,

525 U.S. 266, 287 (1999). Thus, covered jurisdictions in sixteen States (either the States themselves or jurisdictions within those States) are currently required to seek Federal approval of changes in voting-related policies before those policies can be implemented.

The *amici curiae* are States subject in whole or in part to the preclearance requirement of Section 5, and they bear the significant burdens already imposed by that requirement. They do not here challenge the validity of Section 5 or seek to avoid the existing burdens of its preclearance procedure. However, they are concerned that the interpretation of Section 5 adopted by the court below will dramatically increase those burdens by requiring States to seek preclearance of *every* state court decision interpreting or in any way affecting a voting-related statute or regulation—regardless of the grounds for the state court's decision and regardless of the settled expectations created by longstanding decisions. Indeed, because there is no "statute of limitations" applicable to the preclearance requirement, no court decision rendered after a jurisdiction's coverage date is immune from challenge—a point illustrated by the fact that the state court decision at issue in this case is nearly 20 years old.

In sum, the decision below adopts an interpretation of Section 5 that "alters the usual constitutional balance between the States and the Federal Government," *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 65 (1989)(quotations omitted.), even as it pushes the law toward (and perhaps beyond) the outer limits of congressional authority under the Fifteenth Amendment. And it does so without any clear textual or historical warrant.

Contrary to the decision below, the *amici* believe Section 5 should be given an interpretation that avoids this alteration in the federal-state balance and minimizes obvious constitutional concerns. Specifically, we believe the Court should require a clear statement from Congress before interpreting Section 5 to reach state courts' determinations of state law and thereby to require a State's executive to seek Federal permission before enforcing a decision of the State's highest court. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985); *United States* v. *Bass*, 404 U.S. 336 (1971). Alternatively, Section 5 should be construed to reach state courts' decisions *only* where those decisions reflect legislative, rather than judicial, choices. See 42 U.S.C. § 1973c.

STATEMENT

The dispute underlying the decision below traces its roots to a nearly 30-year-old Alabama Supreme Court decision interpreting Article IV, Section 105 of the Constitution of Alabama. That provision specifies that "[n]o special, private, or local law * * * shall be enacted in any case which is provided for by a general law." In 1978, the Supreme Court of Alabama construed this constitutional provision to forbid the enactment of any local law on a subject already covered by a general statute. See *Peddycoart* v. *City of Birmingham*, 354 So. 2d 808, 813 (Ala. 1978).

In 1985, however, Alabama's legislature enacted a law providing that vacancies on the Mobile County Commission would be filled by special election where at least 12 months remained on the unexpired term. This local law squarely contradicted the general law of Alabama, which provided that all vacancies on

county commissions statewide must be filled by gubernatorial appointment. See Ala. Code § 11-3-6 (1975). The United States Department of Justice precleared Mobile County's local law, notwithstanding this obvious constitutional defect.

A Mobile County voter challenged the local law, and the Supreme Court of Alabama rendered a judgment declaring it unconstitutional under Section 105 of the state constitution. *Stokes* v. *Noonan*, 534 So. 2d 237, 239 (Ala. 1988). In Alabama, as in other States, an unconstitutional law is void and unenforceable. See *Ex parte Southern Ry. Co.*, 556 So. 2d 1082, 1090 (Ala. 1989).

In May 2004—16 years after *Stokes* v. *Noonan* invalidated the Mobile County special-election scheme—the Alabama Legislature, with the Governor's approval, amended the general law relating to county commission vacancies. Under the amended statute, county commission vacancies must be filled by gubernatorial appointment "[u]nless a local law authorizes a special election." Act No. 2004-455 (codified at Ala. Code § 11-3-6 (Supp. 2004)). The Justice Department precleared this 2004 amendment.

Mobile County did not adopt a new local law, however, before the next vacancy arose on its county commission. In October 2005, Sam Jones, an African-American who had been elected (and then appointed) to the commission left his seat to become mayor of the City of Mobile. The appellees then sued the Governor in state court, arguing that this new vacancy should be filled by a special election, not a gubernatorial appointment. According to the appellees, the 2004 amendment *revived* the 1985 local law that had been invalidated in *Stokes* v. *Noonan*. The Supreme Court

of Alabama rejected this argument, holding that the 2004 amendment was prospective only and could not revive the previously-voided local law. *Riley* v. *Kennedy*, 928 So.2d 1013, 1017 (Ala. 2005).

Relying on this decision of the state supreme court, the Governor appointed Juan Chastang, an African-American, to fill the vacant seat on the county commission.

The appellees then filed this lawsuit, alleging that the Governor had violated Section 5 of the Voting Rights Act by acting upon the state supreme court's decisions in *Stokes* v. *Noonan* and *Riley* v. *Kennedy* without first obtaining preclearance from the Justice Department. A three-judge district court agreed, holding that (1) the unconstitutional 1985 local law was the relevant "baseline" for determining whether a voting-related change had occurred, and (2) the state supreme court's decisions in *Stokes* v. *Noonan* and *Riley* v. *Kennedy* "constituted changes that should have been precleared before they were implemented." *Kennedy* v. *Riley*, 445 F. Supp. 2d 1333, 1336 (M.D. Ala. 2006) (three-judge court).

At the court's prompting, the Governor requested preclearance of *Stokes* v. *Noonan* and *Riley* v. *Kennedy*. But the Justice Department denied his request. According to the Department, the 1985 local law requiring a special election "remains in full force and effect"—despite the fact that it was declared unconstitutional nearly 20 years ago. Because *Stokes* v. *Noonan* and *Riley* v. *Kennedy* would require filling this particular county commission seat by gubernatorial appointment rather than special election, and because this "transfer of electoral power" would "diminish the opportunity of minority voters to elect a rep-

resentative of their choice to the Mobile County Commission," the Justice Department interposed an objection to the Governor's acting in reliance on these decisions of the state supreme court.

The Department advised the Governor that "until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the method of selection for vacancies on the Mobile County Commission by gubernatorial appointment"—the method of selection required by the state supreme court's rulings—"will continue to be *legally unenforceable* as a matter of federal law." (Emphasis added.)

SUMMARY OF ARGUMENT

The decision below substantially increases the burdens placed on covered jurisdictions by Section 5, and it does so without any clear textual or historical warrant. Given the serious "federalism costs" already associated with Section 5 and the constitutional concerns raised by further judicial expansion of its scope, this Court should interpret that statute carefully to preserve some remnant of the affected States' sovereign dignity. Specifically, because the decision below plainly infringes core federalism principles, this Court should require a clear statement of congressional intent before interpreting Section 5 to require preclearance of state courts' interpretations of state laws affecting voting.

Congress made no such clear statement here: Consistent with the history of Section 5, the text of the statute plainly targets the *political* processes of enactment and administration, not classic judicial decision-making. The preclearance requirement should therefore be limited to those processes. And if Sec-

tion 5 is to be construed to reach *any* state court decisions, it should be reserved for those that are clearly legislative rather than judicial in character. For these reasons, the decision below should be reversed.

ARGUMENT

I. Applying Section 5 To State Courts' Interpretations Of State Law Would Impose Enormous Additional Burdens On States.

Section 5 is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies." *United States* v. *Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 141 (1978) (Stevens, J. dissenting). Because "its encroachment on state sovereignty is significant and undeniable," Section 5 must be "interpreted with care." *Ibid.*

A careful interpretation of Section 5 must begin with an appreciation of the significant burdens it already imposes on covered jurisdictions. The decision below only piles on additional burdens, increasing the costs of compliance for the affected States.

A. Section 5 already imposes significant burdens on covered jurisdictions.

By its terms, Section 5 requires covered jurisdictions to obtain federal administrative or judicial approval of any change in "voting qualification[s] or prerequisite[s] to voting," and any change in "standard[s], practice[s], or procedure[s]" relating to voting. 42 U.S.C. § 1973c. To obtain federal approval of any such change in policy, a covered jurisdiction must prove a negative, namely, that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.*; *City of Rome* v. *United States*, 446 U.S.

156, 183 n.18 (1980). Thus, as this Court noted in *Reno* v. *Bossier Parish School Board*, 520 U.S. 471, 480 (1997) (*Bossier Parish I*), "Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect."

1. To carry this "difficult burden," a covered jurisdiction must spend substantial time and resources making a case for its proposed policy changes. Justice Department regulations require the covered jurisdiction seeking administrative preclearance to submit relevant empirical data, 28 C.F.R. § 51.28, and the covered jurisdiction frequently will provide statistical analyses from experts to demonstrate that its proposed changes are not "retrogressive." See *Georgia* v. *Ashcroft*, 539 U.S. 461, 472 (2003) (describing a State's evidentiary presentation in a declaratory-judgment action under Section 5); *Beer* v. *United States*, 425 U.S. 130, 141 (1976) (Section 5 was intended to "insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise").

Even after the initial submission, moreover, the Attorney General may request additional information or even "conduct any investigation or other inquiry that is deemed appropriate in making a determination." 28 C.F.R. § 51.38(a). Thus, for affected States, compliance with the preclearance procedure in the ordinary case is time-consuming and expensive.

2. These burdens have been increased by expansions of Section 5 since its enactment in 1965.

For example, the geographic coverage of Section 5 has expanded substantially since then. When the Act

was passed, Section 5 applied to only seven States plus specific counties in four more States. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 318 (1966). As subsequent census data relevant to the Act's coverage formula have changed, so has the reach of Section 5.[1] As a result of this expansion of Section 5, today jurisdictions in sixteen States—Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia—are wholly or partially subject to the preclearance requirement. See 28 C.F.R. Pt. 51, App. And its reach may well continue to expand as a result of future demographic changes.

Moreover, this Court has held that a covered county or municipality must obtain Federal permission before implementing state laws that might affect voting, even if the State itself is not covered under Section 5. See *Lopez* v. *Monterey County*, 525 U.S. 266, 287 (1999). Thus, as the number of non-State entities subject to preclearance grows, so too will the number of States whose laws are impacted by that requirement.

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[1] For a jurisdiction to be covered on a particular "coverage date," the Attorney General must determine that the jurisdiction employed a prohibited test or device relating to voter qualification on November 1, 1964, November 1, 1968, or November 1, 1972, and the Director of the Census must determine that fewer than 50 percent of the voting-age population in that jurisdiction was registered to vote on the coverage date or voted in the presidential election that occurred in the November that includes the coverage date. See 42 U.S.C. § 1973b(b). These determinations, moreover, are not reviewable in any court and are effective upon publication in the Federal Register. See *ibid.*

Section 5's preclearance requirement has also seen a dramatic temporal expansion. The Congress that created Section 5 limited its life to five years. See Pub. L. 89-110, 79 Stat. 439 (1965). However, later Congresses extended the life of Section 5 by five years in 1970, see Pub. L. 91-285, 84 Stat. 314-315 (1970); by another seven years in 1975, see Pub. L. 94-73, 89 Stat. 400 (1975); by 25 years in 1982, see Pub. L. 97-205, 96 Stat. 133 (1982); and by another 25 years in 2006, see Pub. L. 109-246, 120 Stat. 580 (2006). Thus, under current law, the affected States—plus any others that may be added in the future as a result of demographic changes—must comply with the preclearance regime for at least another 25 years.

3. The temporal and geographic scope of Section 5 are (at least) matched by its broad substantive sweep. The statute requires preclearance of any "standard, practice, or procedure with respect to voting" that represents a change from prior lawful practice. 42 U.S.C. § 1973c. And this Court has stated that the phrase "standard, practice, or procedure" must be given "the broadest possible scope." *Dougherty County, Ga. Bd. of Educ.* v. *White*, 439 U.S. 32, 38 (1978) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

Following this approach, courts have held that preclearance is required before a covered jurisdiction implements any change affecting, among other things, methods of selecting election judges to supervising voting on election day, see *Foreman* v. *Dallas County, Tex.*, 521 U.S. 979 (1979) (*per curiam*); annexation of inhabited land by a municipality, *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987); internal voting rules of a county political committee,

see *Fortune* v. *Kings County Democratic County Comm.*, 598 F. Supp. 761 (E.D.N.Y. 1984) (*per curiam*) (three-judge court); procedures relating to the mailing of ballots to absentee voters, see *Ward* v. *Alabama*, 31 F. Supp. 2d 968 (M.D. Ala. 1998); procedures for challenging the residency of absentee voters, see *Curtis* v. *Smith*, 121 F. Supp. 2d 1054 (E.D. Tex. 2000); standards governing recounts before the filing of an election contest, see *Boxx* v. *Bennett*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999); the number of judges elected to serve on a state appellate court, see *White* v. *Alabama*, 922 F. Supp. 552 (M.D. Ala. 1996); and methods by which a county selects the form of local government, see *County Council of Sumter County* v. *United States*, 555 F. Supp. 694 (D.D.C. 1983).

Moreover, covered jurisdictions may be required to seek preclearance several times in connection with a single voting-related issue: "even 'an administrative effort to comply with a statute that had already received clearance' may require separate preclearance, because § 5 'reaches informal as well as formal changes.'" *Foreman*, 521 U.S. at 980 (quoting *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985)).

The Justice Department's own regulations make clear that preclearance is required for "[a]ny change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change." 28

C.F.R. § 51.12.[2] The Department's regulations also establish that preclearance of a procedural change does not affect the need to obtain preclearance of substantive changes brought about pursuant to the approved procedure: "For example, if the procedure for the approval of an annexation is changed from city council approval to approval in a referendum, the preclearance of the new procedure does not exempt an annexation accomplished under the new procedure from the preclearance requirement." 28 C.F.R. § 51.16.

In sum, as it is currently understood and applied, Section 5 already makes enormous demands upon affected States. The *amici* believe these existing demands should be held firmly in mind as the Court considers the additional demands imposed by the legal theory adopted by decision below.

B. The decision below would impose even greater practical and dignitary burdens on affected States.

If approved by this Court, the district court's approach would produce additional practical problems for state courts and executives.

1. At the outset, the decision below marks yet another expansion of the substantive scope of Section 5, which necessarily increases compliance costs for covered jurisdictions. Under the district court's approach, these jurisdictions would be required to make "innumerable submissions" to the Department of Justice (or filings in the District Court for the District of

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[2] As Alabama's brief explains, this regulation does not address "the status of changes resulting from orders of State courts." Br. for Appellant 27 n.8 (citing 46 Fed. Reg. 870, 872 (Jan. 5, 1981)).

Columbia) for each statute or regulation affecting voting. *Webber* v. *White*, 422 F. Supp. 416, 427 (N.D. Tex. 1976). Indeed, a covered jurisdiction will have to seek approval not only for the statute or regulation initially enacted, but also for *every judicial interpretation* of the statute or regulation. It will also have to seek approval where, as here, a state court invalidates part or all of it.

Thus, as this case demonstrates, a covered State's executive will have to seek and obtain Federal approval for (1) implementation of the statute or regulation in the first instance, (2) any change in implementation pursuant to a state court's interpretation of the statute or regulation, and (3) discontinuance of implementation based on a state court's determination that the statute or regulation is invalid under state law. The number of preclearance submissions will be limited only by the number of lawsuits brought to challenge any part of a voting-related statute or regulation.

This is no mere theoretical concern. State courts frequently must determine whether state laws affecting voting comport with other requirements of state law, including state constitutional law.[3] Accordingly,

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[3] See, *e.g.*, *City of Grenada* v. *Harrelson*, 725 So. 2d 770 (Miss. 1998) (holding that a trial court could enjoin a city election involving new wards that were illegal under state law, even though new ward lines had been precleared by the Department of Justice); *Hickel* v. *Southeast Conference*, 846 P.2d 38 (Alaska 1992) (holding that proposed election districts created under a precleared reapportionment plan violated the anti-gerrymandering provision of the state constitution); *Kane* v. *Robbins*, 556 So. 2d 1381 (Fla. 1989) (holding that a 13-year-old local law providing for nonpartisan school board elections for a particular county violated the state constitution's prohibition against "special" laws relating to certain elections); *Caddo Par-*

any State that is a covered jurisdiction, or that contains a covered jurisdiction, is likely to have a number of decisions on the books that have not yet been precleared.

To avoid expensive additional litigation, then, covered jurisdictions will have to search for *every* court decision interpreting *any* voting-related statute or regulation since Section 5 became applicable in the covered jurisdiction. If a 20-year-old precedent such as *Stokes* v. *Noonan* is susceptible to challenge under Section 5, then no precedent post-dating the jurisdiction's coverage date is safe. Thus, Attorneys General in affected States will have to spend additional time and resources just to identify potential targets for Section 5 challenges—even before spending the time and resources necessary to make preclearance submissions to the Justice Department. And since Section 5 has been extended again, covered jurisdictions will have to bear these additional costs for the next 25 years.

2. Not only does the decision below impose additional compliance costs, but it does so without due regard for the dignity of the States or the relationships among their branches of government.

Like the governments of many other States and the United States, Alabama's government rests on

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ish School Bd. v. *Board of Elections Supervisors of Caddo Parish*, 384 So. 2d 448 (La. 1980) (holding that a statute requiring a local school board to reapportion its districts violated a state constitutional prohibition against local laws regulating the management of school boards); *Chenault* v. *Bexar County*, 782 S.W.2d 206 (Tex. 1989) (reversing an order of a county commissioners' court that allowed an unstaggered election cycle for county offices in violation of the state constitution).

the principle of separation of powers. Indeed, "[t]he Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States." *Birmingham-Jefferson Civic Ctr. Auth.* v. *City of Birmingham*, 912 So.2d 204, 212 (Ala. 2005). Specifically, the Alabama Constitution provides that "the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala. Const. art. III, § 43. And the Supreme Court of Alabama has held that "[e]ach branch within [the State's] tripartite governmental structure has distinct powers and responsibilities, and [the state] Constitution demands that these powers and responsibilities never be shared." *Monroe* v. *Harco, Inc.*, 762 So. 2d 828, 831 (Ala. 2000).[4]

Virtually every other State—including all of the *amici* here—has a similar separation between the judiciary and the other branches of state government. In some States, as in Alabama, this separation of

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[4] Under this structural framework, the State's courts are empowered to "render final judgments" and in so doing to "say what the law is." *Ex parte Segrest*, 718 So. 2d 1, 5 (Ala. 1998); *Opinion of the Justices No. 338*, 624 So.2d 107, 109 (Ala. 1993); *cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Governor and the Legislature must comply with the courts' decisions. See *Opinion of the Justices No. 338*, 624 So.2d at 110 ("It is the province and duty of the judicial branch of government to interpret the constitution and to say what the law is, and an order issued by a court of competent jurisdiction that interprets the constitution is binding upon the Legislature unless the order is stayed or overturned by a higher court").

powers is expressly required by the state constitution.[5] In others, as with the United States government, the separation of powers is only implicit in the constitutional text, but well recognized in judicial opinions.[6]

This universal insistence on adherence to separation-of-powers principles should be respected in any construction of Section 5. Indeed, this Court in *Connor* v. *Johnson*, 402 U.S. 690 (1971), has already recognized *federal* separation-of-powers concerns in the Section 5 context, holding that orders of federal courts need not be precleared before they are implemented. See *id.* at 691. If that is true for federal courts, then surely the political branches should not hold effective veto power over traditional judicial decisions by State courts. If, in other words, "it would be strange indeed to construe § 5 of the Voting Rights Act * * * to require that actions of a federal court be stayed and reviewed by the Attorney General or the United States District Court for the District of Columbia," *id.* at 695 (Black, J., dissenting), it would be at least as "strange" to construe Section 5 to require that a state supreme court's rulings on issues of state law must be approved by federal authorities before the state or local executives could rely on those rul-

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[5] *E.g.*, Ariz. Const. art. III; Fla. Const. art. II, § 3; Ga. Const. art. I, § II, ¶ III; La. Const. art. II, §§ 1-2; Mich. Const. art. III, § 2; Miss. Const. art. 1, §§ 1-2; N.H. Const. Pt. 1, art. 37; N.C. Const. art. I, § 6; S.C. Const. art. I, § 8; S.D. Const. art. II; Tex. Const. art. II, § 1; Va. Const. art. III, § 1.

[6] *E.g.*, *State of Alaska, Dep't of Health & Social Servs.* v. *Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001) ("The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution").

ings. See *Gangemi* v. *Sclafani*, 506 F.2d 570, 572 (2d Cir. 1974) ("the reasoning of [*Connor*] is also applicable to a decision of a state court").

In short, the decision below fundamentally conflicts with the reasoning of *Connor*, and that conflict should be resolved in favor of respecting the separation of powers within a State. As Justice Kennedy has explained, this Court "should be reluctant to interpret a congressional statute to deny to States the judicial independence guaranteed by their own constitutions." *Alaska Dep't of Environmental Conservation* v. *EPA*, 540 U.S. 461, 512 (2004) (*ADEC*) (Kennedy, J., dissenting).

3. Such "reluctance" is particularly appropriate here. Surely it cannot be disputed that requiring a State's executive to ignore a decision of the state supreme court interpreting a statute or regulation in light of other state law (including state constitutional law) would fundamentally disrupt the constitutional relationships among coequal branches of state government. And this is especially unfair where the State is not a party to the lawsuit that provides the occasion for interpretation of the voting-related statute or regulation. As one court has noted, "[m]ost litigation over voting procedure in state courts involves actions by and against private litigants. The state executive and legislative branches have no control over the frequency of such suits, the questions raised therein, and the decisions reached." *Webber*, 422 F. Supp. at 427-428. In such circumstances, "[i]t would be unrealistic to expect the state executive branch to explain and defend a decision by the state's

judicial branch, a decision with which the other branches may even disagree." *Id.* at 428.[7]

Even if the State's executive did seek preclearance of a state court's decision, the denial of preclearance would create serious governance problems. For one thing, the denial of preclearance would fundamentally compromise judicial independence. While executive and legislative decisions—*political* decisions—can be fine-tuned again and again to respond to specific objections by Federal authorities, judicial decisions are not so malleable and should not be subject to ongoing negotiation with administrative officials. Indeed, "[j]udges cannot, without sacrificing the autonomy of their office, put onto the scales of justice some predictive judgment about the probability that an administrator might reverse their rulings." *ADEC*, 540 U.S. at 512 (Kennedy, J., dissenting). A state court judge should be allowed to determine whether a statute or regulation comports with the state constitution without having to look over her shoulder and attempt to predict whether the Justice Department will approve the effects of that determination.

A denial of preclearance would also compromise the executive's ability to fulfill her constitutional duty

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[7] Even where the covered State is a party to the lawsuit, it may have little incentive to seek preclearance of the court's ultimate decision, especially where that decision itself curtails the authority of state officials. See, *e.g.*, *King* v. *Campbell*, ___ So.2d ___, 2007 WL 4216544 (Ala. Nov. 30, 2007) (striking down a previously-precleared statute allowing the Governor to appoint a circuit judge, holding that the statute violated a constitutional provision requiring election of circuit judges; in such a case the Governor would jeopardize his own appointment authority by seeking preclearance of the court's decision).

to carry out the final decisions of state courts. If the Justice Department denies preclearance (as it did in this case), the Governor would be required to *ignore* an otherwise binding decision from the State's highest court and implement a statute or regulation that admittedly violates state law—even the state constitution. This is a startling intrusion upon *both* the historic policymaking domain of the States *and* the fundamental relationships among coequal branches of State government.

It is enough that Section 5 authorizes a Federal veto of State and local *legislation* in covered jurisdictions. This Court should not extend that power to reach state courts' interpretations of state law, so that Governors or local officials are required to ignore otherwise binding decisions of their States' highest courts and even, as here, to enforce state laws that have already been declared unconstitutional by the State's highest judicial authority.

II. To Minimize Constitutional Difficulties And Additional Federalism Costs, Any Further Expansion Of Section 5 Should Be Subject To A Clear Statement Rule.

The decision below does not merely impose practical burdens and dignitary harms upon covered jurisdictions. It also raises grave constitutional questions. And this Court has long recognized that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr.*

Trades Council, 485 U.S. 568, 575 (1988). And the Court has also long held that, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute. *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 65 (1989)(quotations omitted.)

The court below failed to heed these well-settled rules of statutory interpretation, and the result is a decision that significantly aggravates the long-recognized tension between Section 5 and constitutional principles of federalism. A clear-statement rule would help minimize these serious constitutional concerns and, in so doing, minimize the "federalism costs" imposed by Section 5. *Miller* v. *Johnson*, 515 U.S. 900, 926 (1995).

A. Section 5 already creates serious federalism costs and constitutional concerns.

This Court has long recognized the significant tension between Section 5 and traditional notions of federalism. Justice Powell observed, for example, that Section 5 "marked a radical departure from traditional notions of constitutional federalism," *Dougherty County*, 439 U.S. at 48 (Powell, J., dissenting), and that it was "a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review," *Georgia* v. *United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting).[8] More re-

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[8] Justice Black even argued that "the inevitable effect of any such law which forces * * * States to entreat federal authorities in far-away places for approval of local laws * * * is to create the impression that [such states] are little more than conquered

cently, this Court described Section 5 as "an extraordinary departure from the traditional course of relations between the States and the Federal Government," which imposes significant costs on covered jurisdictions. *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 500-501 (1992).

Given the importance of federalism principles in our constitutional scheme, this Court has recognized that Section 5 should be interpreted in a manner that minimizes any additional federalism costs. For example, the Court in *Bossier Parish I* refused to require covered jurisdictions to prove that their proposed policies would not have a "dilutive" effect, simply because to impose that additional burden would only "increase further the *serious federalism costs* already implicated by § 5." 520 U.S. at 480 (emphasis added). In the same way here, this Court should interpret Section 5 so as to avoid increasing these federalism costs and creating more serious constitutional concerns.

B. The decision below exacerbates constitutional concerns relating to Section 5.

There can be no doubt that the acceptance of the district court's approach would aggravate existing federalism and constitutional concerns. For that approach expands the reach of Section 5 to state courts' determinations of state law, and in so doing requires state executives to ignore the mandates of their own courts until the Justice Department or the District Court for the District of Columbia gives its blessing.

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provinces." *Katzenbach*, 383 U.S. at 359-360 (Black, J., concurring part and dissenting in part).

1. Under the decision below, for example, the Governor of Alabama was required to enforce a statute that the Supreme Court of Alabama had held to be unconstitutional (and therefore void) nearly 20 years earlier. Even if this result did not amount to "commandeering," strictly defined, see *Printz* v. *United States*, 521 U.S. 898, 933 (1997); *New York* v. *United States*, 505 U.S. 144, 188 (1992), the analogy is too close for constitutional comfort. And there can be no doubt that a Federal agency's requiring a State to implement a law that its own courts have held unconstitutional and invalid represents a glaring affront to the State's sovereign dignity. See *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (the States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty").

Even this Court—the Supreme Court of the entire United States, not just of the federal government—has long held that it must defer to a state supreme court's interpretation of state law: "[S]tate courts are the ultimate expositors of state law," *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975); and "the views of the State's highest court with respect to state law are binding on the federal courts," *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (*per curiam*). Yet, contrary to this clear rule of constitutional law, the decision below requires a Governor to ignore his own state supreme court's otherwise authoritative interpretation, and even to enforce a law that the state supreme court has held invalid. And it does so, not because the state law actually violates any federal law, and is therefore invalid under the Supremacy Clause, but because the Justice Department *might* conclude (but very probably will not) that it does.

2. Moreover, if Section 5 is applied to state courts' determinations of state law, the statute would create serious constitutional concerns under *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and its progeny. Those decisions hold that a federal statute is not proper remedial legislation under the Fourteenth Amendment unless "[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.[9]

To be sure, the Court in *City of Boerne* held up the Voting Rights Act as a model of congruent and proportional remedial legislation. But that was precisely because the Act—at that time—was limited in duration and scope. *Id.* at 532-533 (noting that "limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5" of the Fourteenth Amendment). If this Court expands the scope of § 5 to include all state court interpretations of, and (as in this case) decisions about, voting-related statutes and regulations, it would be difficult to say that Section 5 remains a congruent and proportional response to any record of more recent voting-rights violations. Even more so given that the Justice Department has interposed objections to *fewer than 2 percent* of all preclearance requests submitted each year since 1983.[10] See S. Rep. No.

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[9] Because Congress' enforcement powers under the Fourteenth and Fifteenth Amendments are coextensive, see *Lopez*, 525 U.S. at 294 n.6 (Thomas, J., dissenting), the *City of Boerne* analysis applies to Section 5.

[10] During the period from 1982 through 2006, the Justice Department reviewed more than 110,000 preclearance submissions, and interposed only 754 objections—an objection rate of only .68 percent. See S. Rep. No. 109-295, at 13-14 (table). Moreover, "[s]ince 1982, six published cases have ended in a

109-295, at 13-14 (2006) (table). As one commentator has noted, "[t]here is something at least disquieting about the idea of continuing federal intervention if the grounds on which congressional action rest 'have vanished long since, and the rule simply persists from blind imitation of the past.'" Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 731 (1998).

The point here is not to litigate the validity of Section 5 under *City of Boerne*, but merely to acknowledge that the expansive interpretation given by the court below raises significant constitutional concerns. Thus, even if this Court would conclude in some other case that Section 5 survives scrutiny under the *City of Boerne* analysis, the expansion of Section 5 reflected in the decision below undoubtedly pushes the statute to the outer limits of constitutionality.

C. Because further expansion of Section 5 would alter the federal-state balance, a clear statement rule is appropriate.

The Court can mitigate these constitutional difficulties by applying a "clear statement rule" in this context, holding that Section 5 cannot be applied to state courts' determinations of state law absent a

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court ruling or a consent decree finding that one of the 880 covered jurisdictions had committed unconstitutional discrimination against minority voters. The same number of cases ended in a finding that the covered jurisdictions had committed unconstitutional discrimination against white voters. During that same time period, six cases have found that a non-covered jurisdiction committed unconstitutional discrimination against minority voters." *Id.* at 13.

clear statement from Congress that such determinations should be subject to preclearance.

Application of such a rule in this context is required by this Court's precedents. In *Will* v. *Michigan Department of State Police*, *supra*, for example, this Court noted the "ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." 491 U.S. at 65 (quotations omitted.) This clear-statement rule is "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991).

The Court has applied this clear-statement rule in various contexts implicating core federalism concerns. In *United States* v. *Bass*, 404 U.S. 336, 350 (1971), for example, the Court declined to read a federal criminal statute broadly to cover simple possession of firearms without proof of any interstate commerce, because possession was already proscribed by state law and an expansive reading of the federal statute would "dramatically intrude[ ] upon traditional state criminal jurisdiction." This conclusion followed from the rule that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349.

The Court followed the same approach in *Gregory* v. *Ashcroft*, *supra*, holding that Congress had not clearly indicated an intent to exclude appointed state judges from an exception to the Age Discrimination in

Employment Act. 501 U.S. at 470 ("In light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included"). And in *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533, 544-546 (2002), the Court relied on the clear-statement rule in holding that the supplemental-jurisdiction statute does not toll the statute of limitations for claims asserted against States in their own courts but later dismissed on sovereign immunity grounds.[11]

This clear-statement rule applies not only in cases involving Congress' own assertion of authority, but also in cases involving federal agencies' interpretations of statutes. Thus, the Court has held that an administrative agency (such as the Justice Department) cannot apply a federal statute in a manner that "invokes the outer limits of Congress' power" without "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001). Indeed, the Court's concern that federal agencies should not "push the limit of congressional authority" is "heightened where the administrative interpretation alters the federal-state framework." *Id.* at 173.

In cases involving "legislation affecting the federal balance"—such as Section 5—"the requirement of

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[11] Accord *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16 (1981); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *cf. Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 432 (2002) ("We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation").

clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will*, 491 U.S. at 65; *Bass*, 404 U.S. at 349. And this is "obviously important when the underlying issue raises a serious constitutional doubt." *Raygor*, 534 U.S. at 544 (citing *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (applying a clear-statement rule)).

As shown above, that is certainly true here. Accordingly, "[i]f, by some course of reasoning, state courts must live with the insult that their judgments can be revised by a federal agency, the Court should at least insist upon a clear instruction from Congress." *ADEC*, 540 U.S. at 513 (Kennedy, J., dissenting).

III. Because Congress Did Not Clearly State An Intention To Require Preclearance Of State Courts' Interpretations Of State Laws Affecting Voting, Such Decisions Should Not Be Subject To Preclearance.

The decision below should be reversed because Congress has given no clear indication that it believes the Federal government should have to approve state court decisions before state or local executives can follow those decisions. Given the constitutional difficulties raised by further expansion of Section 5, this Court should follow a more restrained approach that is both more consistent with the statutory text and confines the statute to the specific *political* harms that it was intended to remedy.

A. Neither the history nor the text of Section 5 suggests congressional intent to cover state courts' determinations of state law.

As this Court explained in *Beer*, Section 5 represents Congress' response to the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." 425 U.S. at 140 (quotations omitted). The legislative history confirms that Section 5 was intended to address "attempts by a State or political subdivision * * * to alter *by statute or administrative acts* voting qualifications and procedures." S. Rep. No. 89-162, pt. 3, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (emphasis added); H.R. Rep. No. 89-439, at 26 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457-2458. Undoubtedly, then, Congress enacted Section 5 to confront "the ingenuity of those in *legislative* and *executive* positions who were bent on preventing Blacks from voting." *Webber*, 422 F. Supp. at 427 (emphasis added).

1. It is thus no surprise that the statute itself is aimed at ordinary *political* processes affecting voting. And that is why the preclearance requirement is expressly triggered only when a covered jurisdiction "enact[s] or seek[s] to administer" any change in a "standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. *Enactment* is a quintessentially legislative function, see *Black's Law Dictionary* (7th ed. 1999) ("enact" means "[t]o make into law by authoritative act; to pass"), and *administration* is the business of executive officers, see *ibid.* ("administration" means "[t]he management or performance of the executive duties of a government"). Thus, the plain

terms of Section 5 compel the conclusion that Congress did not intend to apply the preclearance requirement to state courts' interpretations of state law in specific cases—the clearest exercises of the judicial function. See *Webber*, 422 F. Supp. at 427 ("The limitation of the applicability of [Section 5] to legislative, executive, and administrative actions is self-evident from the use of these terms").[12]

In sum, "the text of § 5 and what little legislative history there is seems to indicate that the statute was directed against the legislative and executive branches of state governments, and certainly does not indicate that it was intended to cover state court decrees." *Williams* v. *Sclafani*, 444 F. Supp. 895, 904 (S.D.N.Y. 1977) (three-judge court); see also *Moldonado* v. *Rodriguez*, 523 F. Supp. 177, 179 (S.D.N.Y. 1981); *Eccles* v. *Gargiulo*, 497 F. Supp. 419, 422 (E.D.N.Y. 1980). Indeed, like their federal counterparts, state judges are sworn to uphold the federal Constitution, including the equal-protection requirement that the Voting Rights Act was designed to protect.

2. At the very least, Section 5 contains no *clear statement* of congressional intent to require Federal approval of state courts' determinations of state law,

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[12] The appellees' "technical" distinction between a state court's decision and the executive's implementation of that decision (Mot. to Dismiss or Affirm 17) is meaningless. Because the judiciary relies on executive power to enforce or administer court rulings, challenging the *enforcement* of a court decision is tantamount to challenging the decision itself. As the Justice Department made clear in this case, the result of its refusal to preclear the Governor's implementation of *Stokes* v. *Noonan* and *Riley* v. *Kennedy* is that an unconstitutional state law "remains in full force and effect."

especially state constitutional law. Here, there is no indication that Congress, in its consideration of Section 5, ever "intended to bring into issue" state courts' determinations of state law. *Will*, 491 U.S. at 65; *Bass*, 404 U.S. at 349.

If Congress believes such determinations must be precleared before they may be relied on by other state officials, then Congress should say so expressly. Otherwise, because such an interpretation so clearly alters the federal-state balance, Section 5 should not be construed so expansively. See *supra* Section II.B.

B. At a minimum, Section 5 should not apply to state court decisions that reflect purely judicial rather than legislative decision-making.

Applying Section 5 to state courts' decisions necessarily would increase the "federalism costs" of Section 5. If the Court nevertheless concludes that such a result is unavoidable in some circumstances, the Court should at least limit the increase by restricting application of Section 5 to state court decisions that resemble legislative or administrative policymaking.

For example, Section 5 might plausibly apply to a state court's order drawing district lines as a result of the political branches' failure to enact or administer constitutional policies. This Court has made clear that drawing district lines is a *legislative* function, see *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *Gaffney* v. *Cummings*, 412 U.S. 735, 749 (1973); *Connor* v. *Williams*, 404 U.S. 549, 552 n.4 (1972) (*per curiam*); *Ely* v. *Klahr*, 403 U.S. 108, 114 (1971); *Burns* v. *Richardson*, 384 U.S. 73, 84-85 (1966); *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964),

requiring policymakers to "identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality," *Connor* v. *Finch*, 431 U.S. 407, 415 (1977). And courts are permitted to perform this legislative function only "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so." *Wise*, 437 U.S. at 540; *Reynolds*, 377 U.S. at 586.

Where a state court must perform a quasi-"legislative task" such as redistricting or reapportionment, *Wise*, 437 U.S. at 539; *Ely*, 403 U.S. at 114, its decision could be viewed as resembling an "enactment" more than a judicial decision and thus could plausibly be subject to Section 5. See, *e.g.*, *Branch* v. *Smith*, 538 U.S. 254 (2003) (considering a challenge to a state court's congressional redistricting plan); *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981) (Section 5 applies "whenever a covered jurisdiction submits a proposal reflecting the *policy choices* of the elected representatives of the people") (emphasis added).[13]

By contrast, judicial decisions that simply interpret or determine the validity of an existing statute or regulation affecting voting, without prescribing any general policy or practice to be implemented or administered, are of a different kind—not akin to en-

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[13] Similarly, this Court in *Hathorn* v. *Lovorn*, 457 U.S. 255, 265 n.16 (1982), concluded in *dicta* that Section 5 could apply to a state court decision invalidating an election statute in part, excising the invalid portion, and directing compliance with the judicially-amended statute. While that kind of decision may approximate administration of the statute, the decisions at issue in this case—simply declaring the 1985 local law unconstitutional and holding that the 2004 amendment did not revive the unconstitutional law—bear no mark of administration or legislation.

actments or attempts at administration—and should be insulated from the preclearance requirement of Section 5.

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If ever there was an issue of statutory interpretation that demanded application of the clear statement rule, this is it. Here, the district court's interpretation of Section 5 not only upsets the traditional balance between federal and state authority, but it also upsets the traditional separation of powers within the affected States. Because the district court's interpretation is unsupported by any clear statement of congressional intent, that interpretation should be rejected.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

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BOB RILEY, GOVERNOR OF ALABAMA,
Appellant,

v.

YVONNE KENNEDY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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BRIEF *AMICI CURIAE* OF FORMER STATE COURT JUSTICES CHARLES FRIED AND THOMAS R. PHILLIPS IN SUPPORT OF APPELLANT

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BRIEF *AMICI CURIAE* OF FORMER STATE COURT JUSTICES CHARLES FRIED AND THOMAS R. PHILLIPS IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the Honorable Charles Fried served as an Associate Justice of the Supreme Judicial Court of Massachusetts from 1995 to 1999.[1] He also served

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or

as the Solicitor General of the United States from 1985 to 1989. He is currently the Beneficial Professor of Law at Harvard Law School, where he teaches Constitutional Law.

Justice Fried has previously participated as *amicus curiae* in *Medellin* v. *Texas*, No. 06-984 (2007), *Gonzales* v. *Raich*, 545 U.S. 1 (2005), *Rasul* v. *Bush*, 542 U.S. 466 (2004), and, by invitation of the Court, *Alabama* v. *Shelton*, 535 U.S. 654 (2002).

Amicus the Honorable Thomas R. Phillips served as the Chief Justice of the Supreme Court of Texas from 1988 to 2004. Prior to his service on the Texas Supreme Court, he served as a civil district judge in Harris County, Texas. He is now a partner in the law firm of Baker Botts L.L.P.

Chief Justice Phillips has had first hand experience with the federalism issues presented by this case. During his tenure as Chief Justice, a three-judge federal district court held that the Texas Supreme Court's construction of a state election law in *State ex rel Angelini* v. *Hardberger*, 932 S.W.2d 489 (Tex. 1996), was subject to pre-clearance under Section 5 of the Voting Rights Act before that state law, as authoritatively construed by the Texas Supreme Court, could be enforced. *See LULAC of Texas* v. *Texas*, 995 F. Supp. 719 (W.D. Tex. 1998). Although the federal court "recogniz[ed] the potential state constitutional problems that could arise if the resulting election procedure is not pre-cleared," it dismissed these concerns because it "had little doubt that th[e] statute [as construed by the Texas

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submission of the brief. The parties have consented to the filing of this brief.

Supreme Court in *Hardberger*] will be pre-cleared." *Id.* at 726. Ultimately, a constitutional crisis was averted when the Justice Department granted pre-clearance.

As former members of state courts of last resort, *amici* possess a keen understanding of, and can speak to, the disturbing consequences of a federal rule that would require state supreme court decisions such as those at issue here – *i.e.*, decisions exercising the core function of judicial review based on general and unobjectionable principles of state constitutional law – to be "pre-cleared" by a federal executive branch official pursuant to Section 5 of the Voting Rights Act. In their view, such a rule would upset the federal-state balance struck by the Framers in the system of dual sovereignty. Such a rule would also significantly diminish the authority and dignity of state judiciaries, which are fully competent and duty-bound to uphold and apply federal law and are the final arbiters of state law matters. Section 5, in *amici*'s view, is not properly construed to impose such an alteration of the federal-state balance and intrusion upon an essential aspect of state sovereignty.

SUMMARY OF ARGUMENT

This Court has long recognized that the pre-clearance requirements of Section 5 of the Voting Rights Act significantly encroach on the sovereignty of the States. But the Court has held that, in response to the efforts by certain state legislatures and other state officials to deny the right to vote to many individuals on account of their race, Congress was justified in adopting the extreme remedy of requiring certain States to seek pre-clearance of changes to their voting laws. This was necessary to

prevent state legislatures and state executive officials, as they had done in the past, from enacting new restrictions on the right to vote in an effort to circumvent federal court rulings striking down prior restrictions that had been found to be unconstitutional or in violation of the federal civil rights laws.

This Court, however, has never affirmatively held that Section 5's pre-clearance requirement applies to the decisions of state courts, much less state court rulings exercising the core function of judicial review and applying long-standing principles of state constitutional law that do not on their face relate to the exercise of the franchise. And it should not do so here. In enacting the Voting Rights Act, Congress made no finding that state courts – in contrast to state legislatures and state executive branch officials – had sought to deny anyone the right to vote, much less sought to circumvent Congress's efforts to enforce the Fifteenth Amendment's guarantee of the franchise.

It is thus far from clear that the Congress that enacted Section 5 intended it to apply to the decisions of state courts; and even if the Congress had such an intention, it is even less clear – considering legislature's lack of findings on the matter – that Congress would have had the constitutional authority to do so. In an effort to avoid the very difficult constitutional questions that applying Section 5 to the decisions of state courts would raise, not to mention the impact that such a ruling would have on the independence of state judiciaries, this Court should apply its "clear statement rule" and hold that because Congress did not clearly state that Section 5 applies to the

decisions of state courts (and in fact seemed to suggest just the opposite), state court rulings such as the two Alabama Supreme Court decisions at issue here need not be pre-cleared before being enforced by state officials.

ARGUMENT

I. PRINCIPLES OF FEDERALISM AND SOVEREIGNTY DEMAND RESPECT FOR STATE JUDICIARIES.

A. The Constitution Creates a Governmental Structure of Dual Sovereignty.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991). Thus, "under our federal system the States possess sovereignty concurrent with that of the Federal Government." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990).

Our federalist system of dual sovereignty is not an accident of history, but a product of the Founders' design. As this Court has recounted, "the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers." *New York* v. *United States*, 505 U.S. 144, 163 (1992). At the Constitutional Convention, the Founders debated two plans for structuring the Government: the Virginia Plan and the New Jersey Plan. *Id.* at 164. The Virginia Plan envisioned a federal model where the national government directly regulated the people. *Id.* The New Jersey Plan envisioned an all-powerful central government under which the states would serve as passive instruments of the national polity. *Id.* at 164-165.

"In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan." *Id.* at 165. As one founding father explained, " '[t]his Constitution does not attempt to coerce sovereign bodies, states, in their political capacity * * * [b]ut this legal coercion singles out the * * * individual.' " *Id.* (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863)).

This Court has consistently recognized the importance of the Founders' decision to retain the sovereignty of the States, and has gone to great pains to protect that sovereignty not only because the Founders intended for the States to retain "residuary and inviolable sovereignty," THE FEDERALIST No. 39, at 245 (C. Rossiter ed. 1961), but also because the "federalist structure of joint sovereigns * * * ensure[s] the protection of our fundamental liberties." *Gregory*, 501 U.S. at 458; *see id.* ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

As the Court explained in *Gregory* v. *Ashcroft*, a decentralized government "will be more sensitive to the diverse needs of a heterogeneous society; [will] increase[ ] opportunity for citizen involvement in the democratic process; [will] allow[ ] for more innovation and experimentation in government; and [will] make[ ] government more responsive by putting States in competition for a mobile citizenry." *Id.* Consequently, " 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution

as the preservation of the Union and the maintenance of the National Government.' " *Id.* at 457 (quoting *Texas* v. *White*, 74 U.S. (7 Wall.) 700, 725 (1868)).

B. State Courts Play a Special Role in the Constitutional Scheme.

One need not agree with the Court's decision in *Alden* v. *Maine*, 527 U.S. 706 (1999), to agree with the *Alden* Court's recognition of the "special role of state courts in the constitutional design." *Id.* at 757; *see also Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 630 (1874) (extolling the virtues of the "independence of the State courts"). Like their federal counterparts, State courts are tasked with interpreting state legislative enactments and state constitutions, and, in a well-functioning government, serve as an important check against the political branches.

Understanding that its obligation to respect the sovereignty of state governments (and particularly state courts) is no less than that of Congress, this Court has recognized that "respect for federalism compel[s] [it] to defer to the decisions of state courts on issues of state law." *Bush* v. *Gore*, 531 U.S. 98, 141 (2000) (Rehnquist, C.J., concurring); *see Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered * * * in interpreting their state constitutions."); *Murdock*, 87 U.S. at 626 ("[s]tate courts are the appropriate tribunals * * * for the decision of questions arising under their local law"). "That practice reflects [the Court's] understanding that the decisions of state courts are definitive pronouncements of the will of the States." *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

Applying this basic principle, the Court has developed numerous doctrines designed to ensure that the decisions of state courts on state law issues are respected and that the autonomy of state judiciaries is preserved. Chief among those doctrines is this Court's refusal to entertain appeals from state courts on federal law grounds where there is an "adequate and independent state ground" on which a case was decided by the state tribunal. *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983); *see Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). The Court has explained that a "[r]espect for the independence of state courts * * * [has] been the cornerstone[ ] of [its] refusal to decide cases where there is an adequate and independent state ground" on which to affirm the state court judgment. *Long*, 463 U.S. at 1040; *see id.* ("[i]t is precisely because of this respect for state courts * * * that we do not wish * * * to decide issues of state law"). *See also Kansas* v. *Marsh*, 126 S. Ct. 2516, 2530-31 (2006) (Scalia, J., concurring) ("When state courts [decide cases] * * * on *state*-law grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy.") (emphasis in original).

It is this same respect for the independence of state courts and the sovereignty of the States that underlies the Court's "exhaustion doctrine" applicable in federal habeas cases where a prisoner seeks review of a state court conviction. *See Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991) ("The exhaustion doctrine is principally designed to * * * prevent disruption of state judicial proceedings."); *id.* at 726 ("This is a case about federalism. It concerns the respect that federal courts owe the

States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."). *See also Williams* v. *Taylor*, 529 U.S. 420, 436 (2000) (recognizing that "[f]ederal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts").

The "rightful independence of state [courts]" also drives this Court's abstention doctrines. *Harrison* v. *NAACP*, 360 U.S. 167, 176 (1959). "[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until state courts have been afforded a reasonable opportunity to pass on them." *Id.*; *see Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496, 501 (1941) (recognizing "a doctrine of abstention appropriate to our federal system * * * [that reflects a] scrupulous regard for the rightful independence of the state [courts]").

The Court's deference to state tribunals as having "the last word" (*Pullman*, 312 U.S. at 499) on state law issues is founded in a respect, not only for the federal system created by the Founders, but also for state jurists themselves. This Court has always assumed that "the members of [a State's] highest court have done * * * their mortal best to discharge their oath of office." *Sumner* v. *Mata*, 449 U.S. 539, 549 (1981). State court judges, no less than federal jurists, are tasked with protecting the rights of the citizenry and fairly applying the law. And state court judges, no less than Justice Department officials, are fully capable of ensuring, and are duty-bound to ensure, that the application of state law

will not interfere with the right to vote guaranteed by the Fifteenth Amendment. *See O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999) ("State courts * * * are obliged to enforce federal law."); *Hibbs* v. *Winn*, 542 U.S. 88, 113 (2004) (Kennedy, J., dissenting) ("state courts are qualified constitutional arbiters").

The Constitution "recognizes and preserves the autonomy and independence of the States * * * in their * * * judicial departments." *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938). Federal "[s]upervision over * * * the judicial actions of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated by the United States. Any interference [with state courts], except as thus permitted, is an invasion of the authority of the state and, to that extent, a denial of its independence." *Id.* at 79. As explained in the following section, the Congress that enacted Section 5 did not intend the interference sanctioned by the court below.

II. APPLYING THE SECTION 5 PRE-CLEARANCE REQUIREMENT TO STATE COURT DECISIONS WOULD RAISE SIGNIFICANT CONSTITUTIONAL QUESTIONS.

As this Court has said, certain applications of Section 5 of the Voting Rights Act can raise "serious constitutional concerns." *Miller* v. *Johnson*, 515 U.S. 900, 926 (1995). "By its nature," the Act "intrudes on state sovereignty." *Lopez* v. *Monterey County*, 525 U.S. 266, 284 (1999). "Even the Department of Justice has described it as a 'substantial departure * * * from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable." *United States v. Board of Comm'rs of*

Sheffield, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (citation omitted); *see Presley* v. *Etoway County Comm'n*, 502 U.S. 491, 500-501 (1992) (recognizing that "suspension of new voting regulations pending pre-clearance was an extraordinary departure from the traditional course of relations between the States and the Federal Government").

Section 5 provides that a covered jurisdiction that wishes to enact any "standard, practice or procedure with respect to voting different from that in force or in effect on November 1, 1964," must first seek pre-clearance from the Attorney General of the United States or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a); *City of Rome v. United States*, 446 U.S. 156, 162-163 (1980); *see Lopez*, 525 U.S. at 269 ("States and political subdivisions are required to obtain federal pre-clearance before giving effect to changes in their voting laws.").

From this Court's very first consideration of the constitutionality of the Voting Rights Act it recognized that Section 5 was "an uncommon exercise of congressional power." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966); *see City of Rome*, 446 U.S. at 200 (Powell, J., dissenting) ("The pre-clearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act").

The Court, however, has "upheld § 5 as a necessary and constitutional response to some States' 'extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal

court decrees.' " *Miller*, 515 U.S. at 926 (quoting *Katzenbach*, 383 U.S. at 335).

As the Court explained in *Katzenbach*, "Congress had found that case-by-case [enforcement of civil rights laws] was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionists tactics invariably encountered in these lawsuits." *Katzenbach*, 383 U.S. at 328. It thus chose to "shift the advantage of time and inertia from the perpetrators of the evil to its victim by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." *Beer* v. *United States*, 425 U.S. 130, 140 (1976) (internal quotation marks and citations omitted).

In concluding that Congress employed a "rational means to effectuate the constitutional prohibition of racial discrimination in voting" by enacting Section 5, the *Katzenbach* Court noted that "[b]efore [adopting] the measure[ ] Congress explored with great care the problem of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308, 324. The legislative record amply demonstrated that state legislatures from the covered states, as well as many state and local executive branch officials, had engaged in a "widespread 'pattern or practice' " of discrimination. *Id.* at 312. This included the enactment by state legislatures of discriminatory laws designed to disenfranchise black voters, as well as the discriminatory enforcement by state officials of otherwise valid laws that were designed to achieve the same unconstitutional result. *See id.* at 309-315.

Ultimately, the *Katzenbach* Court concluded that Congress's extraordinary intrusion on state

sovereignty was justified in order to combat the efforts of state legislatures and state officials to deny the franchise and evade the enforcement of federal civil rights law. *See id.* at 334-335. [2] In other words, the harm identified by Congress justified the remedy it chose to address that harm. *See City of Rome*, 446 U.S. at 202 (Powell, J., dissenting) (explaining that Section 5 "like any remedial devise, [was] imposed only in response to [a particular] harm").

Although Congress found ample evidence of discriminatory conduct by state legislatures and state executive officials, it made no such findings with respect to state courts. *See* H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 2437 (June 1, 1965) ("House Report"); S. Rep. No. 162, 89th Cong. 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 2508 (Apr. 9, 20, 21, 1965) ("Senate Report"). Nor did the *Katzenbach* Court find any evidence that state courts had engaged in tactics designed to deny the right to vote or aid other branches of state governments in their attempts to evade the enforcement of the federal civil rights laws. *See Katzenbach*, 383 U.S. at 301-336.

Rather, as the legislative history makes clear, the problem was with state legislatures and state executive officials. In explaining the purpose of

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[2] Justice Black dissented. *See Katzenbach*, 383 U.S. at 355 (Black, J., dissenting). Although finding most of the Voting Rights Act's remedial provisions constitutional, he concluded that Section 5's pre-clearance requirement "so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless." *Id.* at 358. Justice Black warned that the provision "approaches dangerously near to wiping the States out as useful and effective units in the government of our country." *Id.* at 360.

Section 5, the House Report declared that "[t]his section deals with the attempts by a State or political subdivision * * * to alter *by statute* or *administrative acts* voting qualifications and procedures in effect on November 1, 1964." H.R. Rep. No. 439 at 2457-58 (emphasis added); *see* S. Rep. No. 162 at 2562. Opposing the Act, some Members of Congress described Section 5 as requiring that "no new election *law, rule, regulation or resolution* of a State or subdivision thereof may be put into effect without the prior approval of a Federal Court or the Attorney General." H.R. Rep. No. 439 at 2470 (emphasis added).

Neither the legislative history, nor the statute itself, makes any mention of Section 5's applicability to *judicial decisions.*[3] *See* 42 U.S.C. § 1973c. And for good reason. Congress made no findings that

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[3] *Branch* v. *Smith*, 538 U.S. 254 (2003), did not decide the question. The parties in *Branch* did not "no[t] dispute" that Section 5 applies to "voting changes mandated by order of a state court." *Id.* at 262. *See also Hathorn* v. *Lovorn*, 457 U.S. 255, 265 (1982) ("Respondents do not dispute that the change in election procedures ordered by the Mississippi courts is subject to pre-clearance under § 5."). This Court reserved the question of whether state court decisions having the effect of rewriting state voting laws were subject to Section 5's pre-clearance requirements. *See Branch*, 538 U.S. at 264-265. The District Court in that case had found that pre-clearance was required for the Mississippi Supreme Court's determination that that State's courts had the authority to craft a redistricting plan in absence of legislative action. *Id.* at 263-264. This Court did not address that question, and instead affirmed the lower court's decision on other grounds. *Id.* at 265. It further directed that "[t]he District Court's alternate holding [on the state court rulings was] not to be regarded * * * as binding upon state and federal officials should Mississippi seek in the future to administer a redistricting plan adopted by the Chancery Court." *Id.* at 256-266.

state courts were engaging in discriminatory acts designed to disenfranchise voters in violation of the Fifteenth Amendment.

Without such legislative findings, Congress could not justify employing its remedial power under the Fifteenth Amendment to deny state courts the autonomy and independence guaranteed them by their special and sovereign status as the final arbiters of state law. *See Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 (2001) (requiring Congress to "identif[y] a history and pattern of unconstitutional employment discrimination by the States" to enact remedial legislation); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 64-65 (2000) (rejecting remedial legislation because "Congress never identified any pattern of * * * discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation"); *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) (when Congress enacts remedial legislation to enforce constitutional rights "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

The application of Section 5 to state court decisions thus would once again put into question the constitutionality of the Voting Rights Act.

III. UNDER THIS COURT'S CLEAR STATEMENT RULE, SECTION 5 SHOULD NOT BE CONSTRUED TO APPLY TO THE ALABAMA SUPREME COURT DECISIONS AT ISSUE HERE.

Recognizing that Congress's decision to encroach on the sovereign rights of States is a constitutionally significant one that the national legislature does not

approach lightly, this Court has required that Congress make its intentions to do so *unmistakably clear*. *See Gregory*, 501 U.S. at 460 (" 'If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' ") (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)).

"This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, power with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16 (1981) ("Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce" constitutional rights).

In addition to protecting the States from unintentional intrusion on their sovereignty, "[a]pplication of the plain statement rule * * * may [also] avoid * * * potential constitutional problem[s]." *Gregory*, 501 U.S. at 464. It would plainly do so here. As explained in the previous section, applying Section 5's pre-clearance requirements to state judicial decisions would raise serious constitutional questions with respect to the provision's validity that have not as of yet been addressed by this Court.

Applying the plain statement rule here, Congress has come far short of clearly stating any intention to impinge the sovereignty of the States with respect to the rulings of state courts by requiring the pre-

clearance of state court decisions on state law issues before those rulings may be enforced.

To be sure, Congress plainly intended to limit the sovereignty of covered states with respect to their legislative enactments and executive branch actions that alter "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. 1973c(a). That is clear from the plain language of the statute, *see id.* (referring to States' attempts to "enact or seek to administer" law relating to voting); *see also Branch*, 538 U.S. at 264-265 (explaining that "[a]n 'enactment' is the product of legislation, not adjudication"), as well as the Act's legislative history, which details the misdeeds of state legislatures and state executive officials with respect to denying blacks the right to vote. *See Katzenbach*, 383 U.S. at 301-336 (detailing those findings).

Nowhere in the statute's text or its legislative history does Congress so much as mention state courts, their judicial decisions or evince any intention to extend its unprecedented encroachment of state sovereignty to the realm of state judiciaries. Nor should this Court assume that Congress intended to do so. The Congress that enacted Section 5 understood that the legislation would be subject to constitutional challenge. Anticipating such scrutiny, the House Report dedicated several pages to the task of defending the Act's constitutionality, *see* H.R. Rep. No. 439 at 2448-2551; and many more to developing the factual record that would be needed to justify the statute's extraordinary remedy, *see id.* at 2438-2444.

Mindful of both the impending constitutional challenges, and its limited constitutional mandate, Congress went to great lengths to limit the scope of

its remedy to the harm that it sought to address. For example, it did not impose Section 5's pre-clearance requirements on all States, but only those that had a significant history of denying the franchise and seeking to evade the enforcement of the federal civil rights laws. *See* 42 U.S.C. § 1973b(b). Similarly, Congress did not require pre-clearance of all legislative enactments and administrative decisions of covered states, but only those related to voting. *See* 42 U.S.C. 1973c(a); *see also Presley*, 502 U.S. at 502 ("changes subject to § 5 pertain only to voting").

In the same vein, Congress did not impose Section 5's requirements on all governmental entities in the covered States, but only those that had engaged in discriminatory conduct – i.e., the political branches of government. *See* 42 U.S.C. 1973c(a). Congress did not explicitly subject state courts to Section 5.

Importantly, in this case, there is no reason to believe that the Alabama Supreme Court was engaged in the kind of malfeasance that spurred Congress to enact the Voting Rights Act in the first place. The Alabama Supreme Court was engaged in a core judicial function, namely, judicial review of state law for consistency with the state constitution. And the two state law doctrines applied by the Alabama Supreme Court here – 1) the restriction on local law exceptions to general laws, and 2) the non-retroactivity of laws absent clear legislative intent – are ones that are well-grounded in state and federal constitutional jurisprudence. *See* Ala. Const. Art. IV, § 105 (1901); *ABC Bonding Co.* v. *Montgomery County Sur. Comm'n*, 372 So.2d 4, 5 (Ala. 1979); 73 AM. JUR. 2D STATUTES § 7 ("State constitutions generally prohibit the enactment of special laws where general laws can be made applicable."); 2

SUTHERLAND STATUTORY CONSTRUCTION § 40:3 (6th ed.) (similar); *see also Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 533 (1998) ("Retroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history.") (citations and quotations marks omitted); *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994) ("presumption against retroactive legislation is deeply rooted in our jurisprudence"); *Dennis* v. *Pendley*, 518 So.2d 688, 690 (Ala. 1987).

The prohibition on special laws has been enshrined in the constitutions of no fewer than 30 states, [4] and can be found in the National Municipal League's Model State Constitution. [5] "The purpose of [such] constitutional prohibitions * * * is to prevent a legislature from providing benefits or favors to

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[4] *See* Alaska Const. art. II, § 19; Ariz. Const. art. IV, § 19; Ark. Const. art. V, § 25; Cal. Const. art. IV, § 16; Colo. Const. art. V, § 25; Del. Const. art. III, § 18; Ill. Const. art. IV, § 13; Ind. Const. art. IV, § 23; Iowa Const. art. III, § 30; Kan. Const. art. II, § 17; Md. Const. art. III, § 33; Mich. Const. art. IV, § 29; Minn. Const. art. IV, § 33; Miss. Const. art. IV, § 87; Mo. Const. art. III, § 40; Mont. Const. art. V, § 26; N.D. Const. art. II, § 70; Neb. Const. art. III, § 18; Nev. Const. art. IV, § 21; N.J. Const. art. IV, § 7(9); N.M. Const. art. IV, § 24; N.Y. Const. art. III, § 17; Okla. Const. art. V, § 59; S.C. Const. art. III, § 34(.9.); S.D. Const. art. III, § 23; Tex. Const. art. III, § 56; Utah Const. art. VI, § 26; Va. Const. art. IV, § 15; W. Va. Const. art. VI, § 39; Wyo. Const. art. III, § 27.

[5] *See* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 4.11 (6th ed. 1968) ("Special Legislation. The legislature shall pass no special or local act when a general act is or can be made applicable, and whether a general act is or can be made applicable shall be a matter for judicial determination.") (http://texaspolitics.laits.utexas.edu/html/cons/features/0301_02/modelcons.pdf).

certain groups or localities." 73 AM. JUR. 2D STATUTES § 7 (2d ed.); *see* Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws In The Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 168 (1993) (explaining that such provisions "mandate the equal treatment of those who are in similar situations"); G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 861 (1991) ("Constitutional prohibitions on special laws and local laws, widely adopted during the nineteenth century, reflected a similar concern [for equality]."). [6]

In Alabama, the rule has been applied to a range of state and local laws that address such diverse topics as "licensing of professional bail agents," *see ABC Bonding Co.* 372 So.2d at 5, "the approval of on-site wastewater disposal systems," *State Bd. of Health* v. *Greater Birmingham Ass'n of Home Builders, Inc.*, 384 So.2d 1058, 1059 (Ala. 1980), "hazardous duty pay" for police officers, *Johnson* v. *City of Fort Payne*, 485 So.2d 1152, 1154 (Ala. 1986), and the procedures for selecting juries, *see Ellis* v. *Pope*, 709 So.2d 1161, 1166 (Ala. 1997).

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[6] Although numerous state constitutions contain provisions prohibiting special, local, or private laws, the precise scope of such provisions (and the judicial construction of them) varies from State to State. *See* 2 SUTHERLAND STATUTORY CONSTRUCTION § 40:3 (6th ed.). Furthermore, such provisions need not be rigidly applied. *See, e.g.*, 73 AM. JUR. 2D STATUTES § 7 (2d ed.) (legislative "classification will survive special-laws constitutional challenge if it bears a reasonable and substantial relation to the object sought to be accomplished by the legislation").

Significantly, the doctrine has also previously been applied in the context of elections. *See Kiel* v. *Purvis*, 510 So.2d 190, 191 (Ala. 1987) (applying doctrine to law governing distribution of "campaign material" at "polling place"); *State ex rel. Bozeman* v. *Hester*, 72 So.2d 61, 64 (Ala. 1954) ("local act changing the method of electing" county official); *City of Birmingham* v. *Norton*, 50 So.2d 754, 757 (Ala. 1950) (law "to provide for elections"). Thus, no one could reasonably conclude that the Alabama Supreme Court was applying this well-established and unobjectionable doctrine in a tortured or even novel way.

Moreover, far from being a tool of a conspiracy of the Alabama political branches to deny black voters the franchise, the two decisions at issue here have instead provided two Alabama governors the opportunity to appoint two black men to public office. Applying Section 5 here thus cannot be justified on the grounds that the rights of black voters will be vindicated. *See City of Rome*, 446 U.S. at 206 (Powell, J., dissenting) ("If there were reason to believe that today's decision would protect the voting rights of minorities in any way, perhaps this case could be viewed as one where the Court's ends justify dubious means."). It will only serve to remove a duly-appointed black official from office.

Finally, the Court should be hesitant to conclude that Section 5's pre-clearance requirements apply to state court decisions because of the role the Justice Department will play in reviewing the state court rulings. The effect of such a holding would be that "decisions by state courts would be subject to being overturned, not just by an[ ] agency, but by an agency established by a different sovereign." *Alaska*

Dep't of Envtl. Conserv. v. *EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting). This is particularly troubling here because federal officials would be tasked with reviewing state court decisions on matters of general state constitutional law that are far afield from the rules and regulations governing voter qualifications that are the principal target of the Voter Rights Act. *See Katzenbach*, 383 U.S. at 312 (recognizing that Congress's principle concern was the "[d]iscriminatory administration of voting qualifications").

In the end, as Justice Kennedy has concluded, "[i]f, by some course of reasoning, state courts must live with the insult that their judgments can be revised by a federal agency, the Court should at least insist upon clear instruction from Congress." *Alaska*, 540 U.S. at 513. There is no such "clear instruction" here. The Court should hold that Section 5's pre-clearance requirement does not apply to the state court decisions at issue in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and hold that the State of Alabama was not required to seek pre-clearance of *Stokes* v. *Noonan*, 534 So.2d 237 (Ala. 1998), and *Riley* v. *Kennedy*, 928 So.2d 1013 (Ala. 2005).

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AMICUS CURIAE BRIEF

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32pgs

No. 07-77

IN THE

Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA,
Appellant,

v.

YVONNE KENNEDY, ET AL.,
Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether this case is moot, given that (i) the disputed seat on the Mobile County Commission has been filled by a special election that was indisputably valid as a matter of both federal and state law, (ii) a federal court would have no basis to remove the newly elected Commissioner from office, and (iii) state law will preclude any similar dispute from arising among these parties in the future.

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INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting-rights cases throughout the nation over the past forty-five years, including cases before this Court. *See, e.g.*, *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young* v. *Fordice*, 520 U.S. 273 (1997); *Clark* v. *Roemer*, 500 U.S. 646 (1991); *Clinton* v. *Smith*, 488 U.S. 988 (1988); *Connor* v. *Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting-rights cases in this Court, including *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986); and *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Lawyers' Committee fully supports appellees' position in this case, both on the merits and on the threshold question of whether Governor Riley's delay in filing a notice of appeal bars review on the merits. We are filing this separate brief to point out that merits review is foreclosed not just by that *statutory* jurisdictional bar, but also by an *Article III* bar, because state-law developments have made this case moot. This

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[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief.

Court should await a case that presents an ongoing controversy between the parties before addressing the merits issue presented in this appeal.

The underlying dispute here involves the method of filling a vacancy on the Mobile County Commission. After the Governor appointed Juan Chastang to fill a vacancy that arose in 2005, appellees challenged the appointment under Section 5 of the Voting Rights Act, on the ground that Alabama had not sought preclearance for the voting change that led to the appointment. The three-judge district court agreed with appellees and ultimately, in May 2007, vacated the gubernatorial appointment, thereby creating a new vacancy on the Commission.

Meanwhile, in April 2006, the Alabama Legislature enacted a law that requires "a special election" to be held "[*w*]*henever* a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat." Ala. Act No. 2006-342, § 1 (emphasis added). No party disputes the validity of this statute under either federal or state law. And the statute was triggered when the district court vacated the appointment of Mr. Chastang. A special election was thus held on October 9, 2007, and the voters of Mobile County elected Merceria Ludgood over Mr. Chastang by a margin of 4 to 1.

Because the 2006 legislation resolves any future dispute about the method of filling vacancies on the Mobile County Commission, this case is now moot unless, if the Governor were to prevail on the merits, the federal courts could somehow unscramble the eggs and unseat the popularly elected Ms. Ludgood in favor of the Governor's preferred replacement (presumably Mr. Chastang, despite his overwhelming defeat at the

polls). That remedy is unavailable. The Governor has never stated that he seeks such an outcome, and even if he did, he could not obtain it. The federal courts cannot unseat Ms. Ludgood without thwarting both the will of the Alabama voters who elected her and the will of the Alabama Legislature as reflected in Act No. 2006-342. A federal court has no authority to override state law in this manner unless federal law requires that result, and here it does not.

In short, no matter how the Court might resolve the parties' dispute on the merits, its decision would be merely advisory, because a federal court would have no basis to alter the electoral status quo in Mobile County. In his opposition to appellees' motion to dismiss or affirm, the Governor argued that this case nonetheless presents a live controversy because the Court's resolution of the Section 5 issue would have a decisive precedential impact on similar cases brought by *other* plaintiffs in *other* Alabama counties for which the Alabama Legislature has not yet enacted counterparts to Act No. 2006-342. But it is hornbook law that such precedential effects are insufficient to create a justiciable controversy *in this case*, as required by Article III.

2. If the Court agrees that the case is moot, it should let the decision below stand rather than vacating that decision. As an equitable remedy, vacatur is appropriate only "where a controversy presented for review has become moot due to circumstances unattributable to" the party seeking appellate relief. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (internal quotation marks omitted). Here, the case has become moot for reasons attributable directly to the Governor—not just because he signed Act No. 2006-342 into law, but also because he twice opted not to seek this Court's intervention prior to the elec-

tion in which Ms. Ludgood was overwhelmingly victorious. In these circumstances, the Governor cannot meet his burden of establishing "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26.

3. This Court could dispose of this case on either of two jurisdictional grounds: the statutory ground emphasized by appellees or the Article III ground discussed here. If, however, the Court addresses the merits, it should affirm the district court's determination that Section 5 precludes gubernatorial appointments in these circumstances absent preclearance of the electoral changes caused by the relevant decisions of the Alabama Supreme Court.

ARGUMENT

I. THIS CASE IS MOOT

A. Resolution Of This Case On The Merits Could Have No Effect On The Electoral Situation In Mobile County

"The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). It is not enough, moreover, that there be a cognizable case when litigation commences. "The rule in federal cases is that an actual controversy must be extant at all stages of review[.]" *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). Hence, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). That rule requires dismissal of this appeal, because newly enacted state law would prevent the federal courts from undoing the results of the recent

Mobile County election even if the Governor were to prevail on the merits (and overcome the statutory jurisdictional bar identified by appellees).[2]

The legal question presented here on the merits is whether the Voting Rights Act requires preclearance of a change in a preexisting and precleared state voting practice when that change is occasioned by a state court interpretation of state election law. But the actual dispute between the parties—*i.e.*, the vehicle for answering that underlying question—concerns the process for filling a vacancy on the Mobile County Commission. When Sam Jones left the Commission to become mayor of Mobile in 2005, Governor Riley asserted the right to appoint a commissioner to serve out Jones's term, whereas appellees maintained that Alabama law required that a special election be held to choose Jones's successor. While the underlying legal question has existed for years, the proper mechanism for filling this seat was the "definite and concrete" controversy (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937)) that gave the federal courts jurisdiction to answer it.

That controversy, however, has been overtaken by subsequent events, as a brief review of the facts reveals. Before Jones left the Commission in 2005, the

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[2] As a jurisdictional issue, mootness must be addressed before the merits, even where (as here) no party argues that the case is moot. *See, e.g., Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 7-8 (1978). The Court need not consider the question of Article III jurisdiction, however, if it dismisses this appeal on the statutory jurisdictional ground advanced by appellees. *See, e.g., Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998); *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984).

Alabama Legislature had twice enacted statutes (in 1985 and 2004) designed in whole or in part to ensure that vacancies on the Mobile County Commission would be filled by popular election rather than gubernatorial appointment. Each time, the Alabama Supreme Court construed state law to preclude the legislation from having that effect. *See Stokes* v. *Noonan*, 534 So. 2d 237 (Ala. 1988); *Riley* v. *Kennedy*, 928 So. 2d 1013 (Ala. 2005); *see generally* Jurisdictional Statement ("J.S.") App. 4a-5a (discussing case background). In 2005, the Governor responded to the latter decision by appointing Juan Chastang to fill Mr. Jones's seat, and appellees filed this suit.

Several months later, in early 2006, the Alabama Legislature enacted yet another statute requiring popular elections to fill Commission vacancies. It provides, in relevant part:

> *Whenever a vacancy occurs* in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy[.]

Ala. Act No. 2006-342, § 1 (emphasis added), *reprinted in* App. 2a. This new provision is substantively identical to the invalidated 1985 legislation. *See id.* § 2; J.A. 114. The Justice Department interposed no objection to the State's eventual preclearance submission, *see* J.S. 6, and no party disputes that this statute is valid under both federal and state law.

The new law had its first application when, in 2007, the district court created an open seat on the Commission by vacating the Governor's 2005 appointment of Mr. Chastang as a violation of the Voting Rights Act.

It is of course disputed whether the district court correctly interpreted federal law in concluding that the appointment was invalid because the State had failed to obtain preclearance of the Alabama Supreme Court's rulings. But whether or not the court's interpretation of federal law was correct, *state* law had been amended by that time to prescribe a popular election to fill the resulting vacancy. The 2006 legislation, enacted while this litigation was pending and after Mr. Chastang's appointment, requires an election "[*w*]*henever* a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat." Ala. Act No. 2006-342, § 1 (emphasis added).[3]

The Governor could have tried to keep that statute from being triggered by asking this Court to intervene promptly in the district court proceedings and thereby prevent the Commission seat from becoming vacant. But the Governor passed up two opportunities to do just that. He did not promptly appeal from the district court's 2006 order concluding that the Chastang appointment required preclearance. And he did not ask this Court to stay the district court's 2007 order vacat-

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[3] The Governor has obliquely suggested that the 2007 special election was somehow held pursuant to the invalidated 1985 statute, although he acknowledges that state election officials recognized that the election was in fact held pursuant to the indisputably valid 2006 statute. J.S. 12 & n.5. There is no ambiguity on this point: the election was held pursuant to Act No. 2006-342. *See* Order and Injunction 2, *Kennedy* v. *Davis*, No. 2007-1259 (Cir. Ct. Mobile Cty. June 28, 2007) (ordering probate judge "to proceed with all applicable preparation . . . 14 days from the date the U.S. Department of Justice . . . pre-clears Act No. 2006-342"), *reprinted in* App. 5a.

ing the appointment. *See* Appellees' Br. 21. As a result of the Governor's inaction, the seat became vacant, the vacancy triggered the application of Act No. 2006-342, and a special election was held in October 2007. Merceria Ludgood assumed office after outpolling Mr. Chastang by a margin of nearly four to one. *Id.*[4]

These events preclude the Governor from obtaining appellate relief from the district court's remedy. The disputed seat is now occupied by an individual who was duly elected by the voters of Mobile County, pursuant to a valid state law that required such an election to be held in precisely these circumstances. Even if the Governor were to prevail on the merits of this case, a federal court could not now undo the results of that popular election, and unseat the electorate's overwhelming choice for Commissioner, without overriding state law as reflected in Act No. 2006-342.

As a threshold matter, the Governor does not even appear to seek that outcome, which may well be politically untenable. But even if the Governor did seek to throw Ms. Ludgood out of office, he could obtain no

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[4] The Governor has asserted that the election schedule "d[id] not comply" with Act No. 2006-342, J.S. 6; *accord id.* at 12 n.5, in that the election was held about four months after the vacancy arose, rather than within the 90-day period specified by the statute. But this was the schedule adopted by a state court that sought to apply the statute as faithfully as possible while accommodating the State's need to submit it for preclearance. *See Kennedy* v. *Davis*, *supra* n.3, at 2. The state court's application of Act No. 2006-342 in these circumstances is presumed valid under state law; indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 106 (1984).

such relief on appeal. Federal courts may upset a State's application of state law only when some provision of federal law requires them to do so. *See, e.g.*, *White* v. *Weiser*, 412 U.S. 783, 795 (1973). Nothing in federal law conflicts with Act No. 2006-342 (which indeed was precleared under Section 5) or with that law's implementation in the 2007 special election. A federal court could no more invalidate the results of that election than it could invalidate the statute itself if, hypothetically, the legislature had enacted the statute in response to the district court's ruling and if that ruling were later reversed. In either case, fidelity to state law requires a federal court to respect the electoral choices of the Alabama people.

In short, no decision by this Court on the merits could have any concrete effect on the electoral situation in Mobile County. This Court thus confronts a mere "difference or dispute of a hypothetical or abstract character." *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 773 (2007). Such "abstract questions" are not "justiciable by a federal court." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979).

B. The Governor's Arguments Against Mootness Are Meritless

The Governor has advanced several rationales for concluding that the Court should decide this case on the merits even though Act No. 2006-342 and its implementation in the 2007 special election remove any live dispute about the method of filling vacancies on the Mobile County Commission. None of these rationales has merit.

First, the Governor notes that "th[e] 2006 Act did not yet exist . . . when [appellees] initiated this litigation." J.S. 12 n.5. That is true but jurisdictionally ir-

relevant: a federal appellate court has no power to decide a case that becomes moot on appeal, whether because of intervening legislation or other reasons. *See, e.g., Church of Scientology*, 506 U.S. at 12. Likewise, the Governor argues that the 2006 legislation did not exist "when the vacancy arose." J.S. 12 n.5. By "the vacancy," however, the Governor means the vacancy Mr. Jones created in 2005 when he left the Commission to become mayor of Mobile. But the 2006 legislation certainly did exist when the most recent vacancy arose: the 2007 vacancy that triggered the operation of Act No. 2006-342 and led to the 2007 special election. It makes no difference that the 2006 legislation was enacted after (indeed, in response to) the *prior*, 2005, vacancy.

Second, the Governor has argued that the case is not moot because he is confronting a similar legal dispute about the Voting Rights Act in a lawsuit brought by other plaintiffs in another Alabama county, for which the Alabama Legislature has not yet enacted a counterpart to Act No. 2006-342. Opp. to Mot. To Dismiss or Aff. 1-2.[5] The Governor argues, in other words, that this Court should resolve his appeal on the merits, even though doing so could have no effect on Mobile County, simply because the underlying legal question

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[5] As the Governor suggested, a vacancy on the Jefferson County Commission arose in November 2007. The Governor filled the vacancy via appointment, but a Jefferson County voter filed suit seeking to have the appointment invalidated and a special election held. *See Plump* v. *Riley*, 2008 WL 192826, at *1 (M.D. Ala. Jan. 22, 2008). The three-judge district court adopted the same interpretation of the Voting Rights Act that the district court in this case did, ruling that the Governor's appointment to the Commission had to be precleared. *See id.* at *3.

has "continuing importance" and arises elsewhere. *Id.* at 2.

That is untenable. "It has long been settled that a federal court has no authority . . . to declare principles or rules of law which cannot affect the matter in issue *in the case before it.*" *Church of Scientology*, 506 U.S. at 12 (emphasis added); *see also Barr* v. *Matteo*, 355 U.S. 171, 172 (1957) (per curiam) ("[A]n advisory opinion cannot be extracted from a federal court . . . no matter how much [the parties] may favor the settlement of an important question[.]"). This case, brought by a group of Mobile County voters, involves a dispute about filling vacancies on the Mobile County Commission. Although the "principles of law" the Governor asks this Court to decide might well affect similar cases in other counties, they "cannot affect the matter in issue" in *this* case. *Church of Scientology*, 506 U.S. at 12.[6] Indeed, it would be no more appropriate for this Court to rule on this case to decide a legal question presented in another case than to invalidate a federal law based on a constitutional challenge brought by a now-deceased plaintiff on the theory that other plaintiffs have raised the same challenge in other cases. If anything, the existence of other potential vehicles for answering the underlying legal question makes it even

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[6] *See also PPL Wallingford Energy LLC* v. *FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("[M]ere precedential effect . . . is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation." (internal quotation marks omitted)); *Radiofone, Inc.* v. *FCC*, 759 F.2d 936, 938 (D.C. Cir. 1985) (separate opinion of Scalia, J.) ("No one would contend that a person affected by no more than the precedential effect of a district court decision would have standing to appeal that decision[.]").

less appropriate to resolve this case now that it has become moot.

Nor does this case fall within the mootness exception for disputes that are "capable of repetition yet evading review." *See generally Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990). As an initial matter, that exception cannot apply here because it requires "a reasonable expectation that the same complaining party w[ill] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *see also Brandt* v. *Bd. of Educ.*, 480 F.3d 460, 464 (7th Cir. 2007) (exception "requires that the claim be repeatable by the same plaintiffs"). But the passage of Alabama Act 2006-342 ensures that appellees (the "complaining part[ies]" here) will not be "subjected to the same action again"—a gubernatorial appointment that supplants a special election in which they, as Mobile County voters, would be entitled to vote.

In any event, even if the "capable of repetition" exception did encompass cases in which *other* complaining parties might bring future suits presenting the same legal issue, there would be no reason to conclude that those future suits would "evad[e] review." This case became moot only because Act No. 2006-342 was enacted and a new commissioner elected pursuant to that statute. (If the 2006 Act had not been passed, this case would not be moot because, if the Governor were to prevail on the merits in this Court, state law would entitle him to fill any vacancy with his own appointee.) There is no basis, however, for concluding that Alabama would promptly enact analogous legislation that would moot similar cases brought in *other* Alabama

counties.[7] And even if there were such a basis, it would mean that the State of Alabama could always be expected to resolve such disputes—and eliminate this set of Voting Rights Act concerns—through its own political process. In those circumstances, the intervention of the federal courts would be both needless and intrusive.

In sum, this case is moot, and the Governor's appeal should therefore be dismissed.

II. Because The Governor's Voluntary Actions Mooted His Appeal, The District Court's Judgment Should Be Left Intact

"The established practice of th[is] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to

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[7] *See Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998) (party invoking exception must show "that the [pertinent] time [period] is always so short as to evade review"). For that reason, and because of the same-complaining-party requirement, this case is easily distinguished from those in which the only event that moots a particular controversy is an intervening election, without (as in this case) a state legislative enactment that ensures that the underlying events will not recur. *See, e.g.*, *Norman* v. *Reed*, 502 U.S. 279, 287-288 (1992) (rejecting mootness claim because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical [electoral] time constraints if we should fail to resolve the constitutional issues that arose in 1990" (citing *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969))). It also bears noting that if the Governor loses a similar lawsuit in another county, he could avoid mootness and obtain review in this Court by securing a stay, either from the district court or from this Court. Here, as discussed below, the Governor forfeited his opportunity to seek a stay from this Court.

dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). But this equitable practice applies only "when mootness occurs through happenstance—circumstances not attributable to the parties—or . . . the unilateral action of the party who prevailed in the lower court." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997) (internal quotation marks omitted). Vacatur is not appropriate when "the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 25; *see also Anderson* v. *Green*, 513 U.S. 557, 560 (1995) (per curiam). In that event, "the losing party has . . . surrender[ed] his claim to the equitable remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 25.

Here, the Governor is responsible in several independent respects for causing his appeal to become moot, and thus he has forfeited any "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. This Court should therefore allow the decision below to stand.

First, the Governor most directly contributed to the mootness of this case by deciding not to file an immediate appeal of the district court's decision of August 18, 2006, which held that the Voting Rights Act required preclearance of the Alabama Supreme Court's decisions in *Stokes* and *Riley*. Had he appealed then, this case almost certainly would have been briefed, argued, and decided during this Court's previous Term, and the district court would not have proceeded, as it did in May 2007, to vacate the appointment of Mr. Chastang before this Court ruled, thereby triggering the operation of Act No. 2006-342.

Significantly, the Governor's decision not to appeal immediately after the August 2006 order precludes the

equitable remedy of vacatur whether or not the Court agrees with appellees (as we do) that the Governor's failure to appeal within sixty days of that decision creates a statutory bar to this Court's jurisdiction. No matter how that statutory issue is resolved, the Governor certainly *could* have appealed immediately after the district court's first decision (*see* Mot. To Dismiss or Aff. 13 (citing cases)); he simply decided not to. Because that decision directly caused this case to become moot, the Governor is no longer entitled to have the adverse judgment vacated. *See Karcher* v. *May*, 484 U.S. 72, 83 (1987) (declining to vacate because "[t]his controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal.").

Second, the Governor caused the case to become moot by independently deciding not to seek a stay from this Court of the district court's May 2007 order vacating his appointment of Mr. Chastang. Nothing prevented the Governor from seeking such a stay, and had he secured one, Mr. Chastang would have remained in office, and once again there would have been no vacancy to trigger Act No. 2006-342. Several courts of appeals have deemed vacatur inappropriate in similar circumstances. *See Boullioun Aircraft Holding Co.* v. *Smith Mgmt.*, 181 F.3d 1191, 1198 (10th Cir. 1999) (refusing to vacate in "recognition of appellants' contribution to the mootness of this appeal by failing to seek a stay of the [district court's] order"); *Mahoney* v. *Babbitt*, 113 F.3d 219, 221-222 (D.C. Cir. 1997) (similar); *Arthur* v. *Manch*, 12 F.3d 377, 380-381 (2d Cir. 1993) (similar). To be sure, this Court might have rejected a stay request, but then the Governor could not fairly have been held responsible for the case becoming moot (at

least on this ground). Precisely because he failed to request a stay, he *can* be held responsible for that outcome, and the district court's judgment should not be disturbed.

Third, the Governor caused the case to become moot by signing Act No. 2006-342 into law shortly after this lawsuit was filed. *See* App. 3a. Again, if that legislation had not become law, this case would not now be moot, because a reversal of the district court's decision would have led to the invalidation under state law of any special election held pursuant to that decision, and thus would have entitled the Governor to fill the disputed seat with his own appointee. The Governor's decision to sign rather than veto Act No. 2006-342 removed that possibility and thus contributed directly to the mootness of this case.

For each of these independent reasons, the Governor, as "the party seeking relief from the judgment below[,] caused the mootness by voluntary action," *U.S. Bancorp*, 513 U.S. at 24, and that judgment should therefore remain intact. It makes no difference that appellees were themselves legislative sponsors of Act No. 2006-342 and thus also played a role in the events that led to the mootness of this case, as this Court's holding in *U.S. Bancorp* makes clear. There the petitioner argued that the judgment below should be vacated because both parties had entered into the settlement agreement that had mooted the case. The Court rejected that argument, explaining:

> It is petitioner's burden, as the party seeking relief from the status quo . . . , to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur. Petitioner's

> voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been.

Id. at 26. That reasoning is equally applicable here. Because the Governor has voluntarily forfeited any claim to the "extraordinary remedy of vacatur," *id.*, the district court's judgment should remain undisturbed.

III. If This Court Reaches The Merits, The District Court's Judgment Should Be Affirmed

If this Court reaches the merits despite the constitutional and statutory obstacles to its jurisdiction, it should affirm for the reasons explained in appellees' brief. Had the Alabama Legislature chosen to repeal Act No. 1985-237 after the Act was precleared and implemented in the 1987 special election, the reversion from an elective to an appointive vacancy procedure unquestionably would have required preclearance. For purposes of Section 5 coverage, it makes no difference that the judicial rather than the legislative branch of Alabama's government prompted the reversion.[8] Section 5 "requires preclearance of *all* voting changes, includ[ing] voting changes mandated by order of a state court." *Branch* v. *Smith*, 538 U.S. 254, 262 (2003) (citations omitted) (emphasis in original). This follows the general rule of *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166 (1985), that Section 5 coverage is

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[8] The Governor attempts to frame the issue as involving only state supreme court decisions, but no principled or logical rule would permit Section 5 coverage to hinge upon whether a voting practice was invalidated by a State's highest court or by one of its other tribunals.

not determined by which state official or body makes a change affecting voting, *id.* at 178.[9]

There are also strong policy reasons to reject the Governor's atextual Section 5 exemption. Changes in state and local voting practices are often implemented through state court decisions, and such decisions clearly have the potential to effect the discrimination in voting that animated Section 5 in the first place. *See* Appellees' Br. 5-7 (discussing state courts' historic role in disenfranchising racial minorities).[10] Coverage of judicial actions that lead to voting changes is thus necessary to ensure that Section 5 is not evaded. Indeed, the Governor's proposed exemption would create significant opportunities to exploit state courts as vehicles for evading the Section 5 process—for example, via consent decrees in lawsuits between nominal plaintiffs and state or local officials.[11]

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[9] *See also LULAC* v. *Texas*, 995 F. Supp. 719, 725 (W.D. Tex. 1998) (three-judge court) ("[T]he Texas Supreme Court accomplished by judicial decision the same result that would have occurred had the legislature amended the statute in the same fashion. We see no reason why such a change, which if enacted by the legislature would require § 5 preclearance, should not also require preclearance if it resulted from a state court opinion.").

[10] *See also Branch*, 538 U.S. at 263-264 (holding that Attorney General's request for additional information concerning Section 5 submission of Mississippi Supreme Court's order that state chancery court could engage in redistricting was "not frivolous or unwarranted at the time it was made").

[11] For example, assume that a city annexed an area into which a substantial African-American population then moved. A city resident could bring an action in state court alleging a state constitutional deficiency with the annexation ordinance, and the city could promptly admit liability in a consent decree entered by

Finally, the Governor's claim that the district court's decision presents unique federalism concerns is highly attenuated. The court's decision offended no substantive state interest at all. The two state court decisions at issue did not rest on an inherent conflict between the state constitution and the use of special elections to fill Commission vacancies. Rather, the conflict arose from the *form* of the relevant legislation—*i.e.*, in the primacy of laws of general application to local acts. And it is only conjectural that Section 5 might freeze into place a practice that cannot be harmonized with the state constitution, as the unchallenged adoption and use of Act No. 2006-342 underscores here.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed as moot, but the judgment below should remain intact. Alternatively, the appeal should be dismissed as time-barred or the district court's judgment should be affirmed on the merits.

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the court, thereby de-annexing (and disenfranchising) the area's residents. *Cf. Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). If the state court's decree were exempt from Section 5 coverage, then the African-American residents of the deannexed area could undo the disenfranchisement only by intervening in the lawsuit to challenge the decree or by filing a separate legal challenge. The result would be to "shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966)—the basic problem that Section 5 was enacted to avoid.

Respectfully submitted.

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FEBRUARY 2008

APPENDIX

ACT No. 2006-342

HB522

78594-4

By Representatives Kennedy, Buskey, Clark and Mitchell (N & P)

RFD: Mobile County Legislation

First Read: 31-JAN-06



HB522

ENROLLED, An Act,

Relating to Mobile County; prescribing procedure for filling certain vacancies on the county commission.

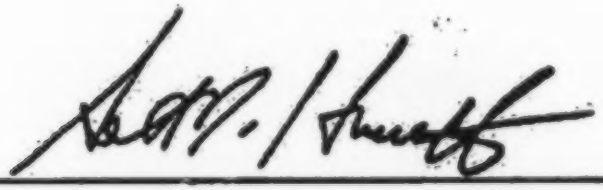
BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1: Whenever a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than 60 days and no later than 90 days after such seat has become vacant. Such election shall be held in a manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.

Section 2: The purpose of this act is to reenact Act 85-237 of the 1985 Regular Session (Acts 1985, P. 137) without change and to reaffirm the Legislature's intention as set forth in that statute.

Section 3: All laws or parts of laws which conflict with this act are repealed.

Section 4: This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.



Speaker of the House of Representatives

Lucy Baxley

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House 14-FEB-06, as amended.

Greg Pappas
Clerk

Senate 30-MAR-06 Passed

APPROVED 4-12-06

TIME 12:30 p.m.

Bob Riley

GOVERNOR

Alabama Secretary of State

Act Num....: 2006-342
Bill Num...: H-522

Recv'd 04/12/06 01:30pmJJB

IN THE CIRCUIT COURT
MOBILE COUNTY, ALABAMA

No. 2007-1259

YVONNE KENNEDY, JAMES BUSKEY
& WILLIAM CLARK,
Plaintiffs,

v.

HONORABLE DON DAVIS,
AS PROBATE JUDGE OF MOBILE COUNTY, ALABAMA,
Defendant.

[Electronic Stamp:
ELECTRONICALLY FILED
6/28/2007 11:59 AM
CV-2007-001259.00
CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
JOJO SCHWARZAUER, CLERK]

ORDER AND INJUNCTION

Because of the time-sensitive nature of this matter and the public importance of an early resolution of it—and because such action would not necessarily harm any party or other person—this matter was expedited for final hearing on the merits pursuant to Ala. R. Civ. P. 65(a)(2) and the Court's inherent authority.

The Court concludes that applicable law requires a special election to fill the vacancy currently existing on the Mobile County Commission. The Court further concludes that such a special election should be set at

the earliest practicable opportunity, in order to protect the right of citizens to vote for representatives of their choosing. Accordingly, the Court sets the following schedule after weighing all of the considerations that the parties have brought before the Court.

The Court ORDERS the Defendant, Probate Judge Davis, to submit this Order to the United States Department of Justice for its review under Section 5 of the Voting Rights Act. Because the Department of Justice is very familiar with ... the current status of this matter. such a submission need not be lengthy, and it should be done at the earliest possible moment. Should the Department of Justice deny preclearance, the parties are directed to inform the Court and to seek further appropriate orders.

The Court ORDERS that the election schedule is as follows, and ORDERS Judge Davis to proceed with all applicable preparation in accordance with this schedule:

i. 14 days from the date the U. S. Department of Justice pre-clears this Order and pre-clears Act. No. 2006-342, Acts of Alabama 2006, the names of all candidates who have qualified with the parties and the parties certification of the candidates to the Judge of Probate shall be due.

ii. The Judge of Probate shall set a date for the Primary Election to be held, said date to be within 51 days of the qualification date; shall have absentee ballots prepared, including overseas military ballots, mailed out and returned by election day, shall prepare other election materials, issue public notices, and appoint and train poll workers for the 1st primary.

iii. if necessary, the Judge of Probate shall set a date for the primary run-off to be held within 42 days of the 1st primary and within said time, the judge of Probate shall complete provisional balloting from 1st primary, receive certification for run-off candidates, prepare absentee ballots, mail and receive said ballots, and prepare other election materials for run-off, providing, however, that if no primary run-off is necessary, the time for holding the general election will be advanced accordingly.

iv. the Judge of Probate shall set a date for the gen[eral election to be] held 42 days after the primary, or primary run off if such run off is necessary. and within said time, complete provisional balloting from run-off primary (if necessary), receive certification for general election candidates, prepare, send out and receive absentee ballots, and prepare other election materials for general election.

v. one (1) week thereafter, the Judge of Probate shall complete provisional balloting for general election and issue canvass results and a certificate of election.

So ordered, this 28th day of June, 2007.

/s/_____
Circuit Judge

AMICUS CURIAE BRIEF

657 B

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45040

No. 07-77

IN THE

Supreme Court of the United States

Bob Riley, Governor of Alabama,
Appellant,

v.

Yvonne Kennedy, et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OF *AMICUS CURIAE* THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

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February 20, 2008

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INTEREST OF THE *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. LDF, widely regarded as the legal arm of the civil rights movement, served as counsel in numerous civil and criminal cases across the South. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

LDF has an extensive history of involvement in efforts to eradicate barriers to the full participation of African Americans in the political process. LDF has represented parties or participated as *amicus curiae* in numerous voting rights cases before this Court and the United States Courts of Appeals. *See, e.g.*, *League of United Latin Am. Citizens v. Clements*, 126 S. Ct. 2594 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). In addition, LDF has particular expertise in jurisprudence concerning Section 5 of the Voting Rights Act of 1965 ("Section 5"), and advocated for its enactment and reauthorization on several occasions, most recently in 2006. *See, e.g., An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 7-8 (2006) (statement of Theodore M. Shaw, Director-Counsel and President, NAACP Legal Defense and Educational Fund).

Of particular relevance to this case, LDF has extensive experience bearing on the role that state courts in jurisdictions covered by Section 5 played in enforcing — or thwarting attempts to enforce — the constitutional rights of African Americans when Congress considered and passed the Voting Rights Act. That experience reveals that some state courts, like other state institutions, used their authority to deny African Americans the right to vote.

SUMMARY OF ARGUMENT

The plain language of Section 5 and this Court's precedents required Alabama to obtain preclearance before filling the Mobile County Commission vacancy by gubernatorial appointment rather than special election. The fact that an Alabama Supreme Court decision was the basis of the change to the voting procedure at issue provides no exemption from Section 5 coverage. After a long experience with persistent disregard of the Constitution, Congress intended to close off all avenues for covered jurisdictions to evade enforcement of the Fifteenth Amendment, including state court orders.

When Congress considered and passed the Voting Rights Act of 1965 ("VRA"), state courts played an integral role in state sanctioned actions that disfranchised African Americans across the South. In particular, the Alabama judiciary demonstrated astonishing activism by authoring a notorious literacy test whose use was later enjoined around the state and stands as an example of the actions that impeded the federal government's efforts to protect the voting rights of African-American Alabamians. Legislative history confirms that Congress was aware of the unfortunate role of state courts when it first attempted to address the disfranchisement of African Americans in 1957, and subsequent events only underscored the need for the prophylactic measures of Section 5 first adopted by Congress in 1965. If Congress had exempted state courts from Section 5 coverage, one of the surest paths to evade the statute's dictates would have led directly to the state courthouse.

ARGUMENT

I. When it Passed the Voting Rights Act of 1965 Congress Was Aware of the Role State Courts Played in Discriminating Against African Americans in Voting.

As Appellees explain, Appellant's proposed exemption of state court orders from Section 5 coverage is contrary to both the statute's plain language and this Court's precedents requiring that state court orders like the Alabama Supreme Court's decisions at issue here be subject to Section 5 coverage. *See Branch v. Smith*, 538 U.S. 254 (2003); *Hathorn v. Lovorn*, 452 U.S. 255 (1982). In addition to consideration of these precedents, Section 5 "must . . . be interpreted in light of its prophylactic purpose and the historical experience which it reflects." *McCain v. Lybrand*, 465 U.S. 236, 246 (1984). As this Court has recognized, "[Section] 5 reflects Congress' firm resolve to end 'the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.'" *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

The breadth of Section 5's language in combination with historical experience and this Court's precedents counsel that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985). "If it were otherwise, States could evade the requirements of § 5 . . . ." *Id.* Given the role that state courts played in denying African Americans access to the

franchise, particularly in Alabama as discussed *infra*, and Congress's recognition that some state courts refused to enforce the mandates of the Fifteenth Amendment, it is inconceivable that Congress intended to create the exemption that Appellant seeks. Indeed, to have done so in 1965 would have "opened a loophole in the statute the size of a mountain," *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring) — a result that Congress clearly did not intend.

Among the VRA's "array of potent weapons," *South Carolina v. Katzenbach*, 383 U.S. at 337, Section 5 has proven remarkably effective because "Congress intended that the Act be given 'the broadest possible scope' to reach '*any* state enactment which altered the election law of a covered State in even a minor way,'" *Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 566, 567 (1969)) (emphasis added). When it passed the VRA, Congress was mindful of the role that state courts in Section 5 covered jurisdictions,[2] particularly in Alabama, routinely played in maintaining or erecting barriers to the franchise for African Americans. As a result, Congress put nothing in the statute that would exclude potentially discriminatory acts by *any* state official or institution that demonstrated blatant disregard for the constitutional rights of African Americans. To read Section 5 to include such a

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[2] When Section 5 took effect in 1965, the following jurisdictions were covered in whole or in part: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. *See* 30 Fed. Reg. 9897 (Aug. 6, 1965).

loophole would inoculate from review precisely the types of actions Congress sought to bring within the statute's scope.

A. At the time of the VRA's Passage, State Courts in Covered Jurisdictions Embraced White Supremacy and Issued Rulings Designed to Prevent African Americans from Asserting Their Constitutionally Guaranteed Rights.

At the time the VRA was passed, there was significant evidence that state courts in the South were hostile forums for African Americans seeking to vindicate their federal constitutional rights. Whatever the context, whether faced with claims devised as part of a legal strategy to promote desegregation, or in unremarkable criminal proceedings, states often turned to courts to help ensure that African Americans were treated as second-class citizens.[3]

In the years before Congress passed the VRA, states routinely violated the constitutional rights of African Americans and their allies in defense of segregation and other white supremacist policies. When those conflicts reached the judicial system, state courts routinely failed to offer fair forums and

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[3] Such experiences led an LDF attorney who later succeeded Thurgood Marshall as Director-Counsel to the following observation: "It is a common defense tactic in segregation cases to urge that the cause should first be heard in the state courts, where, with rare exceptions, the difficulties of the plaintiff will be multiplied." Jack Greenberg, *Race Relations and American Law* 61-62 (1959).

enforce the Constitution. When the police illegally arrested civil rights activists who held protests or conducted sit-ins at lunch counters, or when state officials interfered with the NAACP's organizing efforts or maintained segregated public facilities, state courts simply did not enforce the Constitution. In those circumstances, LDF accumulated significant experience before this Court appealing unconstitutional decisions from state court orders in covered jurisdictions. *See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Fox v. North Carolina*, 378 U.S. 587 (1964); *Harris v. Virginia*, 378 U.S. 552 (1964); *Mitchell v. City of Charleston*, 378 U.S. 551 (1964) (per curiam); *Green v. Virginia*, 378 U.S. 550 (1964); *Williams v. North Carolina*, 378 U.S. 548 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Avent v. North Carolina*, 373 U.S. 375 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana v. NAACP*, 366 U.S. 293 (1961); *Boynton v. Virginia*, 364 U.S. 454 (1960); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Morgan v. Virginia*, 328 U.S. 373 (1946).

Of course, this Court's jurisdictional review was, as it remains today, limited. *See* 28 U.S.C. § 1257. Therefore, absent a federal interest, adjudication of state law questions — such as interpretations of voter qualifications and any review of decisions regarding those qualifications — was available only in state courts, whose judiciaries were a product of the Jim Crow system in which they existed at the time Congress considered and passed the VRA.

Elected judgeships, in combination with segregated state bars and law schools, and the widespread disfranchisement of African Americans, led to state judiciaries that counted segregationists, but virtually no African Americans, among their ranks in 1965. State courts in covered jurisdictions were expressly politicized bodies, with judges elected to courts of all levels, or appointed by the legislature. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 Tex. L. Rev. 1081, 1087 & nn.29-33 (1966) (reviewing judicial selection methods in every state).[4] At the time of the VRA's passage, these courts included virtually no African Americans, and not a single African American sat on a southern state appellate court. Beverly Blair Cook, *Black Representation in the Third Branch*, 1 Black L.J. 260, 272 (1971).

Alabama's record provided no exception. "In the 1950s, the Alabama State Bar openly supported segregation legislation." *SCLC v. Sessions*, 56 F.3d 1281, 1287 (11th Cir. 1995) (*en banc*). In addition, the only state-supported law school in Alabama did not enroll a Black student until 1964.[5] *White v.*

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[4] Alabama, Georgia, Louisiana, Mississippi, and North Carolina elected judges. *Id.* at 1087 & n.29. The legislatures of Virginia and South Carolina appointed judges. *Id.* at 1087 & n.32.

[5] The very few African Americans admitted to the Alabama State Bar before 1965 had either attended law schools in other states or studied law privately. *See* U.W. Clemon & Bryan K. Fair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940-1980*, 52 Ala. L. Rev. 1121, 1128-29, 1132-33 (2001). To maintain segregation at the University of Alabama, the State provided limited financial assistance to Black Alabamians who

Alabama, 867 F. Supp. 1519, 1555 (M.D. Ala. 1994), *vacated on other grounds by* 74 F.3d 1058 (11th Cir. 1996). By 1994, there had only ever been five African Americans on Alabama's circuit courts, the state's trial courts of general jurisdiction.[6] *SCLC*, 56 F.3d at 1288. Although Alabama elects its circuit court judges in partisan elections, they had all first gained their judgeships through gubernatorial appointment. *Id.* at 1285, 1288. A similar record existed at the appellate level, where only two African Americans had served as appellate judges in the 125 years before a VRA case challenging the appellate courts' electoral scheme. *White*, 867 F. Supp. at 1527.[7]

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attended law school elsewhere. But for their race, these students were qualified to attend the University of Alabama School of Law. *Id.* at 1133 n.64.

[6] Other covered jurisdictions have similar records. As this Court observed, by the late 1980s, no Black person had ever been elected to the Louisiana Supreme Court. *Chisom v. Roemer*, 501 U.S. 380, 385-86 (1991). Similarly, African Americans in Georgia and Mississippi were largely excluded from the state bars and judiciaries until the 1960s and 1970s. *See Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1571 (S.D. Ga. 1994) (noting that African Americans "were not admitted to Georgia's law schools until the 1960's and then only in token numbers"); *Martin v. Allain*, 658 F. Supp. 1183, 1193 (S.D. Miss. 1987) (noting that the first Black judge in Mississippi received a gubernatorial appointment to a trial court in 1977, and that only three Blacks had served on Mississippi's courts of general jurisdiction by 1987).

[7] Both of those judges were initially appointed, rather than elected to judicial office, and, as one of them stressed in his statement to a federal court, incumbency was the key to his success in an election to maintain his judgeship: "Incumbency is the best method . . . to overcome the reluctance on the part of many white voters to vote for a black candidate." *White*, 867 F.

These state judiciary demographics, however, were manifestations of the deeper problem. The Alabama Supreme Court demonstrated astonishing activism in upholding official discrimination, akin to that demonstrated by other state elected officials, and displayed blatant disregard for both the federal constitutional rights of African Americans, and specific orders from this Court instructing it to enforce those rights. In one such case, the Alabama Supreme Court, in rejecting a jury discrimination claim, made its view of African Americans clear by explaining that "[t]he evidence shows that a large majority of the Negroes are ignorant, with little or no education and low moral character, and there is much venereal disease among them and a large percentage of illegitimacy." *Fikes v. State*, 81 So.2d 303, 309 (Ala. 1955), *rev'd*, 352 U.S. 191 (1956). Similarly, it found no abuse of discretion and upheld a criminal contempt order against an African-American woman who refused to respond to a prosecutor who addressed her simply as "Mary."[8] *Ex parte Hamilton*, 156 So.2d

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Supp. at 1534 (ellipsis in original). To date, only three African Americans have ever served on the Alabama Supreme Court, and only two have survived elections. Thomas Spencer et al., *Moore Wins, Credits God*, Birmingham News, Nov. 8, 2000, at 1; Philip Rawls, *Justices for All*, Mobile Register, Sept. 3, 1999, at A1; Michael Sznajderman, *Blacks Still Face Obstacles in Election to Top Offices*, Birmingham News, Aug. 23, 1998, at 14.

[8] The Alabama Supreme Court recounted the exchange between the woman held in contempt and the prosecutor in its opinion:

> Q. What is your name, please?
> A. Miss Mary Hamilton.
> Q. Mary, I believe – you were arrested – who were you arrested by?

926 (Ala. 1963), *rev'd per curiam sub nom. Hamilton v. Alabama*, 376 U.S. 650 (1964). This Court reversed in both cases.

Another example of the Alabama Supreme Court's steadfast refusal to recognize the constitutional rights of African Americans, which occasioned four trips to this Court and four reversals, involves Alabama's attempt to dismantle and bankrupt the NAACP. On the Alabama Attorney General's petition for a temporary restraining order, a circuit court enjoined the NAACP from doing business in Alabama for its failure to register, even though "Alabama had never ousted any other corporation for nonregistration, and the registration statute mentioned only a fine as penalty for failure to comply." Michael Meltsner, *Southern Appellate*

A. My name is Miss Hamilton. Please address me correctly.
Q. Who were you arrested by, Mary?
A. I will not answer a question –
BY ATTORNEY AMAKER: The witness's name is Miss Hamilton.
A. – your question until I am addressed correctly.
THE COURT: Answer the question.
THE WITNESS: I will not answer them unless I am addressed correctly.
THE COURT: You are in contempt of court
ATTORNEY CONLEY: Your Honor – your Honor –
THE COURT: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine.

Ex parte Hamilton, 156 So.2d 926 (Ala. 1963), *rev'd per curiam sub nom. Hamilton v. Alabama*, 376 U.S. 650 (1964).

Courts: A Dead End, in Southern Justice (Leon Friedman, ed. 1965) 142. The same court acceded to the Alabama Attorney General's demand for a contempt order when the NAACP refused to provide its membership lists, and issued a $100,000 fine. *NAACP v. Alabama ex rel. Patterson*, 91 So.2d 221 (Ala. 1956), *rev'd*, 357 U.S. 449 (1958). On appeal, the Alabama Supreme Court refused to hear the merits of the case, holding that the NAACP had not complied with procedural rules. *Id.*

This Court considered the merits of the constitutional claim, over Alabama's objections, because it held that the Alabama Supreme Court's procedural bar to hearing the merits of the NAACP's claim could not be reconciled with Alabama case law. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 457-58 ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."). As for the First Amendment claim, this Court unanimously upheld the NAACP's right to keep its membership lists secret because disclosure would likely lead "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. This Court reversed and instructed the Alabama Supreme Court to lift the contempt order and the related $100,000 fine. *Id.*

In a remarkable ruling, the Alabama Supreme Court willfully disregarded this Court's decision on federal constitutional law, and described it as resting on a "mistaken premise." *Ex parte NAACP*, 109 So.2d 138, 139 (Ala.), *rev'd per curiam sub nom. NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959). It

again affirmed the circuit court's contempt judgment and $100,000 fine in contravention to this Court's instructions. *Id.* at 140. This Court was, therefore, again required to intervene, and unanimously provided the Alabama Supreme Court with explicit instructions regarding its earlier order: "In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition." *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 241 (1959) (per curiam).[9]

Again, this Court was called upon to protect the rights of Blacks when Alabama officials doggedly pursued their campaign against the NAACP in the state courts. The NAACP's appeal to the Alabama Supreme Court of an unconstitutional circuit court order proved fruitless. The Alabama Supreme Court did not hear the case on the merits, and instead found that the NAACP's brief did not conform to procedural rules. *NAACP v. Alabama*, 150 So.2d 677, 682 (Ala.) ("It is clear that nothing is presented to this court for review."), *rev'd sub nom. NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 296 (1963).

On appeal before this Court, Alabama argued, as it had in the first case, that the Alabama Supreme

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[9] Although the Alabama Supreme Court this time followed instructions, the circuit court "persisted in its failure to hold a hearing on the issue which had been so pressing in 1956 that the association had been ordered out of business without one." Meltsner at 144. The NAACP then turned to the federal courts for adjudication of its constitutional claims, but they abstained from entering the case until the state courts ruled on the issues. *NAACP v. Gallion*, 190 F. Supp. 583 (M.D. Ala. 1960), *vacated by* 290 F.2d 337 (5th Cir. 1961), *vacated by* 368 U.S. 16 (1961) (per curiam).

Court decided the case on "a nonfederal ground of decision adequate to bar review in this Court of the serious constitutional claims which the Association present[ed]." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 296 (1963). Finding that position "wholly unacceptable" because the NAACP had, in fact, complied with Alabama procedural rules, this Court heard the case on its merits and unanimously reversed the Alabama state court's decision, finding that Alabama unconstitutionally infringed on the First Amendment associational rights of the NAACP and its members. *Id.* at 296, 297, 310. In short, the Alabama state courts refused to enforce the constitutional rights of African Americans and their allies, a proclivity the courts displayed repeatedly.[10] Unsurprisingly, the Alabama judiciary's bold disregard for this Court's orders generated enormous attention that did not escape the attention of members of Congress.[11] *See, e.g.*, Anthony Lewis,

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[10] *See, e.g., Abernathy v. Alabama*, 380 U.S. 447 (1965) (reversing convictions of a mixed-race group who attempted to be served at a segregated lunch counter); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (reversing Alabama Supreme Court holding that state libel laws lacked protections for freedom of speech and press); *Gober v. City of Birmingham*, 373 U.S. 374 (1963) (per curiam) (reversing convictions of civil rights demonstrators); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963) (same); *Anderson v. Alabama*, 366 U.S. 208 (1961) (per curiam) (reversing a manslaughter conviction where a systematic exclusion of African Americans from the jury was shown); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (reversing Alabama Supreme Court's interpretation of federal statute that would have allowed a labor union to discriminate on the basis of race).

[11] An op-ed by sitting Alabama Supreme Court Justice Tom Parker received similar attention in 2006. *See* Tom Parker,

Alabama Ouster of NAACP Upset, N.Y. Times, June 2, 1964, at A1; James E. Clayton, *Patience of Justices Thins In Alabama NAACP Case*, Wash. Post, Mar. 25, 1964, at A8; *NAACP Penalty Again Ruled Void*, N.Y. Times, June 9, 1959, at A31.

B. The Alabama Judiciary Actively Suppressed Attempts by African Americans to Exercise the Right to Vote.

Aside from its legally unsound rulings in the cases detailed above, the Alabama judiciary was a significant actor in the state machinery that disfranchised African Americans. In the 1940s, the Alabama Supreme Court construed the Alabama Constitution — in what Appellant would describe as an exercise of its "core judicial-review function" — to effectively eliminate judicial review of decisions by local voter registrars to enroll voters. As a result, voter registrars throughout Alabama were left with unfettered discretion to deny African Americans the right to register to vote. In addition, Alabama state court judges devised Alabama's notorious literacy test and issued extraordinarily activist decisions in response to Congress's first attempts to enforce the Fifteenth Amendment, the Civil Rights Acts of 1957 and 1960.

Alabama Justices Surrender to Judicial Activism, Birmingham News, Jan. 1, 2006 ("State supreme courts may decline to follow bad U.S. Supreme Court precedents because those decisions bind only the parties to the particular case.").

1. The Alabama Literacy Test.

The Alabama Supreme Court played a leading role in ensuring the effectiveness of Alabama's literacy test, the state's most notorious tool used to disfranchise African Americans. "[P]art of a movement that swept the post-Reconstruction South to disenfranchise blacks," *Hunter v. Underwood* 471 U.S. 222, 229 (1985), Alabama's use of a literacy test to determine voter qualifications originated at its 1901 Constitutional Convention.[12] *See United States v. Alabama*, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court) ("Delegate after delegate took the floor eager to be put on record as favoring 'the absolute disfranchisement of the Negro as a Negro.'" (footnote omitted)); *Davis v. Schnell*, 81 F. Supp. 872, 876-77 (S.D. Ala.) (three-judge court), *aff'd per curiam*, 336 U.S. 933 (1949); Virginia Van der Veer Hamilton, *Alabama: A Bicentennial History* 94-95 (1977); J. Mills Thornton III, *Dividing Lines: Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham and Selma* 435-36, 678 n.94 (2002); C. Vann Woodward, *Origins of the New South, 1817-1913* 229 (1951).

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[12] Alabama's literacy test was immediately challenged by African Americans under the Fourteenth and Fifteenth Amendments, but their claims failed on jurisdictional grounds. *Giles v. Harris*, 189 U.S. 475 (1903).

Section 186[13] of the Alabama Constitution allowed citizens to seek judicial review of county registrar decisions denying them the right to register to vote.[14] Ala. Const., art. VIII, § 186(6) (repealed 1996). The Alabama Supreme Court struck an initial blow against Section 186's usefulness by requiring lower courts to presume the validity of any Board of Registrars' initial decision to disfranchise an applicant. *Boswell v. Bethea*, 5 So.2d 816, 821 (Ala. 1942). Later, the court adopted stringent pleading requirements for Section 186 cases. *See Hawkins v. Vines*, 30 So.2d 451 (Ala. 1947); *Madison v. Nunnelee*, 20 So.2d 589 (Ala. 1945). In short, the Alabama Supreme Court construed Section 186's judicial review provision so that it became a dead-letter, leaving voter registrars with unfettered authority to administer the literacy test in a discriminatory manner. As detailed below, they achieved remarkable success in this endeavor until the VRA barred the use of literacy tests. *See* 42 U.S.C. § 1973b.

Alabama's literacy test became an even more important tool to disfranchise Blacks when this

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[13] Section 186 provided: "A person to whom registration is denied shall have the right of appeal by filing a petition to the Circuit Court or Court of like jurisdiction for the County in which he seeks to register to have his qualification as an elector determined." Ala. Const., art. VIII, § 186(6) (repealed 1996).

[14] In the early 1940s, the Jefferson County Board of Registrars initially attempted to avoid judicial review by simply adding to the rolls the African-American plaintiffs who filed suit to contest its decisions, thereby rendering the cases moot. *See* Thornton at 154. However, the Alabama courts eventually heard several cases under Section 186.

Court's decision in *Smith v. Allwright*, 321 U.S. 649 (1944), eliminated the use of the white primary. *See* Donald S. Strong, *Alabama: Transition and Alienation, in The Changing Politics of the South* 427, 443 (William C. Havard ed., 1972). Shortly thereafter, Alabama adopted the Boswell Amendment through referendum, which augmented the Alabama Constitution's literacy qualification for voters by requiring new voters to demonstrate that they could "understand and explain" any article of the United States Constitution. *Id.*

A federal court declared the literacy requirement unconstitutional, citing both proponents' racial appeals in the ratification campaign, and administration of the amendment that resulted in the exclusion of African American citizens from the franchise. *Davis*, 81 F. Supp. at 880 ("It . . . clearly appears that this Amendment was intended to be, and is being used for the purpose of discriminating against applicants for the franchise on the basis of race or color."). "[T]he legislature responded in the summer of 1951 with a new amendment, written by the arch-segregationist Senator Miller Bonner of Wilcox and co-sponsored by all the Black Belt senators," that was ratified by voters in December 1951. Thornton at 437.

Once the 1951 amendment took effect, the Alabama Supreme Court helped implement and execute the Alabama literacy requirement. In doing so, it took affirmative steps to effect a change in voting that constitute precisely the type of official action that Congress specifically sought to cover by Section 5.

In particular, the Alabama Supreme Court authored a uniform questionnaire to be completed by all applicants. *See United States v. Atkins*, 323 F.2d 733, 735 (5th Cir. 1963); Thornton at 437-38. Remarkably, at a time when only 19.4% of African-American Alabamians were registered to vote, the court-written questionnaire asked the applicant whether she "believe[d] in free elections," and whether she "w[ould] support and defend the Constitution of the United States and the Constitution of the State of Alabama." *See United States v. Penton*, 212 F. Supp. 193, 206 (M.D. Ala. 1962) (questionnaire reprinted therein). If the questionnaire itself did not deter Blacks from registering to vote, its administration by Alabama's local voter registrars made registration virtually impossible for them. Thornton at 438.

Litigation under the Civil Rights Acts of 1957 and 1960 led to only a limited and fleeting reduction in Alabama's discriminatory use of its questionnaire. *See, e.g., United States v. Atkins*, 323 F.2d 733 (5th Cir. 1963) (Dallas County); *Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962) (Macon County); *United States v. Penton*, 212 F. Supp. at 201 (Montgomery County); *United States v. Alabama*, 7 Race Rel. Rep. 1146 (M.D. Ala. 1962) (Bullock County); *United States v. Mayton*, 7 Race Rel. Rep. 1136 (M.D. Ala. 1962) (Perry County). The Alabama Supreme Court responded by designing 12 new questionnaires, taking square aim at the impact of the new federal civil rights statutes and frustrating civil rights organizers' efforts to teach voters how to pass the

literacy test.[15] *See United States v. Parker*, 236 F. Supp. 511, 519-29 (M.D. Ala. 1964) (reprinting the test).

The impact of the Alabama Supreme Court's new questionnaire was substantial and immediate. In his 1965 congressional testimony concerning the VRA, Attorney General Katzenbach described the test as follows:

> For Negroes to register in Dallas County was . . . extremely difficult. In February 1964, it became virtually impossible. Then, all Alabama county boards of registrars . . . began using a new application form. This form included a complicated literacy and knowledge-of-government test. . . . [T]he great majority of voting-age Negroes, unregistered, now faced still another, higher obstacle in voting.[16]

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[15] For example, the first new questionnaire asked an applicant whether she had "ever seen a copy of this registration form before receiving this copy today." *See United States v. Parker*, 236 F. Supp. 511, 519-29 (M.D. Ala. 1964) (reprinting the test). Other questions were aimed at testing an applicant's knowledge of nuanced facts pertaining to government that could not possibly have any bearing on the applicant's ability to read, *e.g.*, "Are post offices operated by the state or federal government?" *id.* at 524; "How many stars are there in the United States Flag?" *id.* at 523; "In what town or city is the court-house located in this county?" *id.* at 527. As one political scientist has remarked, "[t]o refer to the form as a 'literacy test' is absurd." Strong at 444.

[16] Of course, Alabama's use of a literacy test perpetuated the impact of the inferior educational opportunities provided to African Americans in the era of *de jure* school segregation by

Hearings on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 89th Cong. 6-7 (1965). Accordingly, like the earlier version, its use was enjoined around the state before passage of the VRA. *See, e.g., United States v. Parker*, 236 F. Supp. 511, 519-29 (M.D. Ala. 1964) (Montgomery County); *United States v. Hines*, 9 Race Rel. Rep. 1332 (N.D. Ala. 1964) (Sumter County); *United States v. Perry*, 9 Race Rel. Rep. 1330 (S.D. Ala. 1964) (Choctaw County).

Accordingly, the Alabama Supreme Court played a pivotal role in creating Alabama's literacy test and then guaranteeing that judicial review of discriminatory decisions by voter registrars who administered the test was fruitless in the years preceding passage of the VRA. Such changes are precisely the type of official action impacting voting that Congress sought to cover through Section 5.

2. The Alabama Judiciary's Hostility to the Civil Rights Acts of 1957 and 1960.

In the period preceding enactment of the VRA, the Alabama judiciary instituted other voting changes that later would fall within the ambit of Section 5's coverage. This was the case, for example, when it issued extra-jurisdictional decrees and orders that sought both to frustrate efforts by African

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linking access to the franchise to literacy. *See Gaston County v. United States*, 395 U.S. 285, 296-97 (1969).

Americans to secure the franchise and undermine Congress's efforts to enforce the guarantees of the Fifteenth Amendment through the Civil Rights Acts of 1957 and 1960. These two laws represented Congress's first post-Reconstruction attempts to eradicate voting discrimination in the South, and congressional experience with the state's resistance influenced the structure of the VRA.

The Civil Rights Act of 1957 (the "1957 Act"), the first federal civil rights law passed after Reconstruction, included three major provisions related to voting. *See* Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38 (1957) (codified as amended at 42 U.S.C. § 1971(a)-(d)). *First*, it affirmed that "[a]ll citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude." 42 U.S.C. § 1971(a)(1). *Second*, it stated that it is unlawful for a private individual or a person acting under color of law to interfere or attempt to interfere with the right to vote. *Id.* § 1971(b). *Third*, it authorized the Attorney General, on behalf of the United States, to institute civil actions for preventive relief when there were reasonable grounds to believe that any person would deprive a person of the right to vote. *Id.* § 1971(c).[17]

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[17] In addition, the 1957 Act provided for the creation of the U.S. Commission on Civil Rights, which would have investigative, but not prosecutorial powers. Pub. L. No. 85-315, §§ 104-06, 71 Stat. 634, 634-36 (1957) (codified as amended at 42 U.S.C. § 1975 *et seq.*). Further, the 1957 Act provided for the appointment of an Assistant Attorney General for Civil Rights. *Id.* § 111, 71 Stat. at 637.

In seeking to enforce the 1957 Act, both the U.S. Commission on Civil Rights (the "Commission") and the Department of Justice, by way of the newly appointed Assistant Attorney General for Civil Rights, encountered recalcitrance and intransigence from state officials — particularly Alabama state court judges — when they attempted to take action in accordance with the 1957 Act. In response to complaints of voting discrimination from Black citizens in Alabama, the Commission subpoenaed records and held field hearings in the state in 1958. Berl I. Bernhard, *The Federal Fact-Finding Experience—A Guide to Negro Enfranchisement*, 27 Law & Contemp. Probs. 468, 470 (1962). The Commission initially requested voter and registration records from Dallas and Wilcox Counties. However, a defiant state court judge in the circuit covering those counties responded immediately:

> At once Judge Hare summoned the counties' grand juries into emergency session, charged them to investigate whether there had been any maladministration of the registration laws, and impounded all the registrars' records while the supposed investigation continued, thus forestalling their production before the commission. Hare emphasized to the jurors that they could take as long as they needed to look into the matter. Thereafter, as grand jury succeeded grand jury, the records remained under impoundment. . . .
>
> The Civil Rights Commission never did get to examine the records, but in August 1959 its staff reported that the

> evidence of discrimination in registration in the counties nevertheless was clear.

Thornton at 441.

Subpoenaed voter registrars followed the lead of hostile state court judges by appearing at Commission hearings, but refusing to testify. *In re Wallace*, 170 F. Supp. 63, 66-67 (M.D. Ala. 1959); Richard L. Lyons, *Alabama Aides' Action Called Reprehensible*, Wash. Post, Dec. 11, 1958, at A1. George Wallace, then an Alabama Circuit Court judge, who had set the course followed by Judge Hare in Dallas and Wilcox counties, refused to provide the registration records subpoenaed by the Commission for Barbour and Bullock counties. *In re Wallace*, 170 F. Supp. at 67. In a federal action to enforce the Commission's subpoena requiring production of the registration and voting records, both the registrars and Judge Wallace mounted an argument that bears a striking resemblance to the claims presented by Appellant in this case: that enforcement "would constitute an improper inquiry into judicial acts of judicial officers." *Id.* A federal district court rejected this argument, and ultimately ordered Judge Wallace and the registrars to produce the records. *Id.* at 70.

In response to the evidence of hostile state judiciaries and recalcitrant state officials, Congress attempted to broaden the scope of relief available under the 1957 Act by enacting the Civil Rights Act of 1960 (the "1960 Act"). Following the Commission's recommendations, which were directly informed by its experience in Alabama, the 1960 Act's key provision related to enforcement of the Fifteenth Amendment and required that voter registrars retain

and preserve voter registration records for 22 months following any election. *See* Pub. L. No. 86-449, §§ 301-06, 74 Stat. 86, 88-89 (codified as amended at 42 U.S.C. § 1974 *et seq.*).

Following enactment of the 1960 Act, the Alabama judiciary, once again, played a critical role in undermining federal legislative efforts to extend the franchise and enforce the guarantees of the Fifteenth Amendment. When the Attorney General sought to inspect records in Montgomery County, a circuit court judge — without jurisdiction — declared the 1960 Act unconstitutional and immediately issued "a temporary injunction and restraining order forbidding the Attorney General of the United States, his agent, servants, employees and attorneys . . . to inspect or copy the records and papers in the possession, custody and control of [all Alabama] Boards of Registrars . . . under the color of authority purportedly given by the Civil Rights Act of 1960." *See Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 851 (M.D. Ala. 1960) (describing state court action) (internal quotation marks omitted; ellipses in original), *aff'd per curiam*, 285 F.2d 430 (5th Cir. 1961).[18]

Similarly, without regard for the fact that the 1960 Act provided the federal courts with exclusive jurisdiction to settle disputes under its provisions, another state court granted the Wilcox County Board

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[18] Extra-jurisdictional decisions like the circuit court's concerning the 1960 Act's constitutionality likely influenced Congress's decision to mandate that declaratory judgment actions concerning Section 5 be brought in the District Court for the District of Columbia. *See* 42 U.S.C. § 1973*l*(b).

of Registrars' request for declaratory and injunctive relief, enjoining the United States from "attempting to enforce the demand for voting records." *See Kennedy v. Bruce*, 298 F.2d 860, 862 (5th Cir. 1962) (describing state court action).

Plainly, the Alabama judiciary did not stand idly by when other state officials sought to perpetuate the disfranchisement of African-American Alabamians. Instead, the Alabama judiciary repeatedly facilitated various state actions taken to frustrate enforcement of federal laws aimed at extending the franchise to African Americans.

When Congress passed the Voting Rights Act in 1965, it did so explicitly in response to this long history of discrimination in the covered jurisdictions and the ineffectiveness of prior federal legislative efforts aimed at extending the franchise to minority voters. This evidence included the discriminatory actions taken by state courts in covered jurisdictions, including their active participation in official attempts to thwart civil rights, particularly the federally-protected voting rights of African Americans.

Like other state institutions, state courts effected changes to voting that Congress unquestionably sought to cover by Section 5. To read Section 5 to exempt state court decisions would create a result at odds with this Court's precedents and the statute's plain text and purpose, thereby insulating from scrutiny precisely the types of actions Congress sought to bring within the statute's scope.

II. Legislative History Indicates that Congress Knew State Courts Were Hostile to Black Voting Rights and Intended to Address the Problem.

The VRA's legislative history leaves no doubt that Congress intended to address the actions of state courts that had the potential to create barriers to the franchise. The centerpiece of the evidence Congress heard when considering initial enactment of the VRA concerned the Alabama literacy test's extraordinary efficacy in disfranchising potential Black voters.

As explained above, the Alabama Supreme Court played a significant role in ensuring that the literacy test was implemented and executed in a manner that resulted in the widespread disfranchisement of African American citizens. In crafting Section 5, which reaches "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c (emphasis added), Congress could not have meant to exclude voting changes implemented by the very state institution that drafted what was arguably the most effective disfranchisement tool and demonstrated such eagerness to disfranchise African Americans. *See* H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441-42 (1965) (describing experience with literacy test in Selma, Alabama); S. Rep. No. 89-162, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2546 (1965) (same). In short, Congress had no reason to determine that state courts in covered jurisdictions would adjudicate fairly cases involving the voting rights of African Americans.

Moreover, the record of Congress's efforts to remedy the extensive voting discrimination against

African Americans in covered jurisdictions begins with the Civil Rights Acts of 1957 and that experience further bolsters this point. The legislative history of the 1957 Act illustrates that Congress understood that state courts frequently sustained violations of African Americans' constitutional rights, and nothing occurred between 1957 and 1965 to alter this understanding.

As described above, the central provision of the 1957 Act provided the Department of Justice with new authority to pursue civil remedies for violations of the Fifteenth Amendment and of the statutes prohibiting racial discrimination in voting. *See* Pub. L. No. 85-315, § 111, 71 Stat. 634, 637 (1957), (codified as amended at 42 U.S.C. § 1971). Essential to the effectiveness of that new authority was the 1957 Act's provision that allowed the Department of Justice to bypass state courts by mandating federal jurisdiction of claims and allowing waiver of exhaustion of state remedies. *Id.* (codified as amended at 42 U.S.C. § 1971(d)).[19]

In hearings before the House of Representatives and the Senate, Attorney General Herbert Brownell, Jr., stressed the importance of this subsection to ensure that federal enforcement efforts would no longer be tied to hostile and resistant state courts. In his statement to the House Judiciary Committee, he

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[19] The statute provides: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." 42 U.S.C. § 1971(d).

cited "elimination of the requirement that all State administrative and judicial remedies must be exhausted before access can be had to the Federal court," among the top three changes to the civil voting statute. H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1980. In addition, a Georgia Supreme Court decision, reversed by this Court, figured prominently among his examples of blatant disregard for constitutional rights in state administrative agencies and courts. *Proposals to Secure, Protect, and Strengthen Civil Rights of Persons Under the Constitution and Laws of the United States: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 85th Cong. 6 (1957) ("The United States Supreme Court recently reversed the conviction of a Negro sentenced to death by a State court because of a showing that Negroes had been systematically excluded from the panels of the grand and petit juries that had indicted and tried him.").[20]

In his Senate testimony, the Attorney General further stressed the abdication of responsibility by state agencies and courts to adhere to the Constitution: "[I]n those areas where the local

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[20] Attorney General Brownell referred to *Williams v. Georgia*, 349 U.S. 375 (1955), in which this Court considered the Georgia Supreme Court's holding that an African-American defendant did not make out a prima facie claim for jury discrimination where a superior court judge drew the names of jurors from a box using color coded tickets. *Id.* at 378 n.3 ("[T]he practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance . . . ." (quoting *Avery v. State*, 70 S.E.2d 716, 722 (Ga. 1952)).

community completely fails to respect Federal rights, the Federal Government must have power to act, and to act effectively, if the Federal Constitution and the Federal laws are to be, in the words of the Constitution, the 'supreme law of the land.'" *Id.* at 9.

Congress heeded this advice, and the House Judiciary Committee commented on the importance of the jurisdictional provision in its report to the Congress. *See* H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1975. ("The Committee on the Judiciary believes that a waiver of the doctrine of exhaustion of State administrative remedies is necessary in civil-rights cases, particularly when injunctive relief is sought."). When it accepted Attorney General Brownell's suggestion to allow 1957 Act claims to proceed to federal court without state court exhaustion, Congress provided an alternative to state courts and agencies that frequently disrespected the constitutional rights of African Americans.[21]

Nothing happened between 1957 and 1965 to alter the characteristics of state courts in covered jurisdictions that would have led Congress to exempt state court decisions from Section 5 coverage. Instead, as explained in the House Report accompanying the VRA, "the essential justification for the . . . bill," was the Department of Justice's inability to enforce the Fifteenth Amendment under

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[21] Indeed, the Minority Report confirmed this intent, arguing that this portion of the 1957 Act "provide[s] a device to bypass State laws, State remedies, State courts, State judges, and State agencies." H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 2015.

the 1957 Act — a failure attributable in no small part to state courts such as Alabama's. H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2442 (1965). In fact, the very first witness who appeared at the House hearings on the VRA, Attorney General Katzenbach, described a 1957 Act enforcement action against, among others, Judge James Hare of Dallas County, Alabama, who had issued an unconstitutional injunction that barred civil rights activists from meeting at the height of the Selma voting rights campaign. *See Hearings on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 8 (1965); *United States v. Clark*, 249 F. Supp. 720, 726 (S.D. Ala. 1965) (three-judge court) (per curiam).

Further, as detailed above, Congress knew that Alabama courts were fundamentally unfair forums for hearings on claims involving race discrimination and erected precisely the types of barriers to adjudication that Congress helped the Department of Justice bypass in the 1957 Act. Voter registrars demonstrated extraordinary creativity in administering Alabama's literacy test to disfranchise African Americans, and, having already effectively eliminated judicial review of the registrars' decisions, the Alabama Supreme Court further guaranteed disfranchisement by frequently rewriting and restructuring, in increasingly restrictive ways, Alabama's literacy test. It was with this record in mind that Congress enacted Section 5 of the Voting Rights Act in 1965.

Congress gave Section 5 the broadest possible language and intended that the statute's scope reach

all changes that impact voting, including any that took effect because of state court decisions.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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Appellant,

v.

YVONNE KENNEDY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF *AMICUS CURIAE* OF THE PROJECT ON FAIR REPRESENTATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE[1]

The Project on Fair Representation at the American Enterprise Institute ("The Project") is a public interest organization dedicated to the promotion of equal opportunity and racial harmony. The Project works to advance race-neutral principles in the areas of education, public contracting, public employment, and voting. Through its resident and visiting academics and fellows, The Project conducts seminars and releases publications relating to the Voting Rights Act ("VRA"). American Enterprise Institute fellow Edward Blum, The Project's director, testified before Congress regarding the reauthorization of Section 5 of the VRA.

The Project has a direct interest in this case. It opposed the 2006 reauthorization of Section 5 of the VRA on the basis that it runs contrary to the principles of race neutrality to which it is dedicated and to the American ideal of individual equality to which The Project is profoundly committed. For these reasons, The Project respectfully submits this brief in support of Appellant and urges the Court to reverse the judgment below.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, Amicus states that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION

This appeal arises from the district court's determination that (1) two race-neutral decisions by the Alabama Supreme Court, although grounded in state law, required "preclearance" from the Department of Justice ("DOJ") under Section 5 of the VRA; and (2) the "change" supposedly wrought by these decisions was retrogressive. In addition to being flatly incompatible with a proper interpretation of Section 5, the district court's decision, as Appellant explains, "'exacerbate[s] the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality.'" Brief of Appellant at 46, Riley v. Kennedy (No. 07-77) (Jan. 14, 2008) ("App. Br.") (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*"). Indeed, the facts of this case underscore that Section 5 can no longer be defended as a necessary deviation from our federal system of government.

The VRA was enacted in 1965 to defeat the systemic and on-going effort to deny African-Americans the right to vote secured by the Fifteenth Amendment, U.S. Const. amend. XV, § 1. Although the Fifteenth Amendment made intentionally discriminatory voting practices unlawful, the promise of an equal right to cast a ballot remained unfulfilled. In response, Congress enacted Section 5 of the VRA, which required "covered jurisdictions" to obtain "preclearance" from the federal government before making any "change" in voting practices. Pub. L. No. 89-110, § 5, 79 Stat. 437 (1965). The constitutionality of Section 5, "an extraordinary departure from the traditional course of relations

between the States and Federal Government," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-501 (1992), was upheld in *Katzenbach v. South Carolina*, 383 U.S. 301 (1966).

In rejecting South Carolina's challenge, the Court took account of the acts of defiance that prompted the legislation. This evidence suggested that preclearance was the only remedy that could overcome the obstacle posed by these "exceptional conditions" and "unique circumstances." *Id.* at 334-35. Given the detailed record of intentional discrimination, the Court reasonably concluded that Section 5 was a "rational means" of enforcing the "constitutional prohibition of racial discrimination in voting." *Id.* at 324. Nearly fifteen years later, the Court again upheld Section 5 under this rational basis standard. *City of Rome v. United States*, 446 U.S. 156, 177 (1980). In dissent, however, then-Justice Rehnquist argued that Congress' Fifteenth Amendment "enforcement" authority is limited to enacting legislation necessary "to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit." *Id.* at 213 (Rehnquist, J., dissenting).

This appeal again draws the constitutionality of Section 5 into question. The Alabama Supreme Court merely held that a state law was inconsistent with the Alabama Constitution and that this law was not revived by subsequent legislation. App. Br. 24-25. In concluding that these race-neutral decisions were subject to federal preclearance, the district court thus effectively held that "state courts have no authority—at least absent further federal permission, which here was refused—to remedy

the unconstitutional defect, and the State . . . must keep in place a practice held invalid under state law." *Id.* 26 (quoting omitted). As Appellant explained, this result is constitutionally problematic in that it "would not be 'congruent and proportional,' within the meaning of *City of Boerne v. Flores*, 521 U.S. 507 (1997), to any threat posed to Fifteenth Amendment rights in this particular context." App. Br. 48.

While Appellant has persuasively explained why Section 5, as interpreted by the district court, could be unconstitutional as applied here, the organic defects in this law actually render it facially invalid. By abandoning the "rational basis" standard employed in *Katzenbach*, and replacing it with a "congruent and proportional" inquiry, *Boerne* essentially adopted the position taken by then-Justice Rehnquist in *Rome*. Although this analytical change alone warrants revisiting the constitutionality of Section 5, it was Congress' 2006 decision to reauthorize Section 5, 42 U.S.C. § 1973c (2006) ("new Section 5"), in a way that completely divorces it from the Fifteenth Amendment that renders it unsustainable at this juncture. Section 5 is not the same law the Court upheld in 1965 and 1980 and the factual support for a federal preclearance regime has eroded over time. The combination of these factors renders new Section 5 unconstitutional in at least two ways.

First, Congress failed to compile any evidence that continuing intrusion into the province of state and local governments remained necessary to prevent intentionally discriminatory voting practices. Indeed, Congress was presented with compelling evidence that these jurisdictions had broken free from their

discriminatory past. Ignoring this evidence, Congress relied on inapt proxies, such as Section 2 suits and Section 5 objections interposed by DOJ, to justify the reenactment of Section 5 for another 25 years. Under *Boerne*, Congress must support its legislative judgment with evidence that the law actually addresses an ongoing and pervasive violation of the Fifteenth Amendment. Congress utterly failed to do so here. Given the transformative changes that have occurred in states such as Alabama over the last half-century, and the concomitant lack of evidence supporting reauthorization, the "federalism costs exacted by § 5 preclearance" are no longer justified. *Miller v. Johnson*, 515 U.S. 900, 926 (1995).

Second, even if there were sufficient evidence to justify continued federal preclearance for these covered jurisdictions, new Section 5 is not limited to redressing intentional discrimination—the evil addressed by the Fifteenth Amendment. Before *Boerne*, this Court had interpreted Section 5 to prevent changes in voting practices that had a retrogressive effect. *Beer v. United States*, 425 U.S. 130 (1976). Under the *Beer* standard, discriminatory purpose was not part of the Section 5 equation. *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) ("*Bossier Parish I*"). After *Boerne*, however, the Court shifted away from this "effects" test toward a "totality of circumstances" standard that looked to purpose and inched Section 5 closer to the constitutional line. *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Under the *Ashcroft* standard, for example, the views of minority legislators and widespread support from the minority community became central to the Section 5 analysis. These new considerations, among others, injected some measure of purpose into Section 5.

New Section 5 overruled *Ashcroft* and restored the *Beer* "effects" test. H. R. Rep. No 109-478, at 71 (2006) ("[T]he Committee makes clear that Congress explicitly rejects all that logically follows from Justice O'Connor's statement [from *Georgia v. Ashcroft*] that 'In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice.'"). By retreating from *Ashcroft* to the pre-*Boerne* "effects" test, 42 U.S.C. § 1973c(b) (2006), Congress eliminated any basis for defending Section 5 as "enforcing" legislation. "Congress does not enforce a constitutional right by changing what the right is." *Boerne*, 521 U.S. at 519.

Finally, even if a federal veto over the voting changes of covered jurisdictions remains an appropriate means of enforcing the Fifteenth Amendment, new Section 5 makes race the "predominant, overriding factor" in violation of the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. 630, 649 (1993). Even under the predecessor law, the tension between Section 5 and the Equal Protection Clause was evident. *Ashcroft*, 539 U.S. at 491 (Kennedy J., concurring). New Section 5 makes this conflict impossible to avoid; it fossilizes minority percentages in all covered jurisdictions for the next 25 years, 42 U.S.C. § 1973c(b), (d), and denies the States any flexibility in structuring their election laws. Under new Section 5 race is not a predominant factor—it is the only factor. "There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

ARGUMENT

I. THE HISTORY OF THE VOTING RIGHTS ACT

A. *The Voting Rights Act of 1965*

The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. The Fifteenth Amendment protects against intentional discrimination. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62 (1980).[2] Although "the commitment was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks."[3] *Rice v. Cayetano*, 528 U.S. 495, 513 (2000). "Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter." *Id.*

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[2] In *Bolden*, the Court determined that Section 2 of the VRA paralleled the Fifteenth Amendment. *Id.* at 61. Although Congress overturned this interpretation of Section 2 in the 1982 Amendments to the Voting Rights Act, and clarified that it intended Section 2 to reach discriminatory effects as well as discriminatory purpose, *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986), *Bolden* remains this Court's authoritative interpretation of the scope of the Fifteenth Amendment.

[3] There is no question that "an insidious and pervasive evil . . . had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309; *see, e.g., Guinn v. United States*, 238 U.S. 347 (1915) (grandfather clause); *Terry v. Adams*, 345 U.S. 461 (1953) (white primary); *United States v. Thomas*, 362 U.S. 58, 80 (1960) (registration challenges).

In 1965, "to banish the blight of racial discrimination in voting," *Katzenbach*, 383 U.S. at 308, Congress enacted the VRA "under its authority to enforce the Fifteenth Amendment's proscription against voting discrimination." *Lopez v. Monterey County*, 525 U.S. 266, 269 (1999). The VRA was a watershed legislative event, which at its "heart," consisted of a "complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant." *Katzenbach*, 383 U.S. at 315. The VRA has two central enforcement provisions: Section 2, 42 U.S.C. § 1973, and Section 5, *id.* § 1973c. The provisions "combat different evils" and "impose very different duties upon the States." *Bossier Parish I*, 520 U.S. at 447.

Section 2 provides that

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a). Section 2 is directed at existing voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97-417, at 28, reprinted in 1982 U.S.C.C.A.N. 177, 205 (1982). Section 2 applies in all fifty States, "was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute," *Bolden*, 446 U.S. at 61, and is not at issue in this appeal.

Section 5, in contrast, was highly controversial. Unlike Section 2, it applied only to southern states and other "covered jurisdictions." 42 U.S.C. § 1973b. By its terms, Section 5 prevented any "covered jurisdiction" from changing a "standard, practice or procedure with respect to voting" until either DOJ or the District Court for the District of Columbia ("DDC") "preclear[ed]" it as "not hav[ing] the purpose and ... effect of denying or abridging the right to vote on account of race or color ...." *Id.* § 1973c. Section 5 thus subjected voting regulations in covered jurisdictions to a federal veto and, therefore, "stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 177 (2007); *Berry v. Doles*, 438 U.S. 190, 200-01 (1978) (Powell, J., concurring) ("It must be remembered that the Voting Rights Act imposes restrictions unique in the history of our country on a limited number of selected States.").

The constitutionality of Section 5 was immediately tested. South Carolina claimed that Section 5 "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution." *Katzenbach*, 383 U.S. at 323. Recognizing the "exceptional conditions" and "unique circumstances" before it, *id.* at 334-35, the Court explained that the factual record compiled by Congress demonstrated a history of States resorting to the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *id.* at 335; and the inability of Congress to combat such discriminatory practices with less drastic

remedies, *id.* at 313 ("Congress has repeatedly tried to cope with the problem .... Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination."). Against this backdrop, the Court sustained Section 5 under a rational basis standard. *Id.* at 324 ("As against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting.") (emphasis added).

As the Court explained, the acts of intentional discrimination cataloged by Congress had produced a wide racial disparity in voter registration and turnout. *Id.* at 313, 330. Given this "reliable evidence of actual voting discrimination," and the "absence of proof that [the covered jurisdictions] have been free of substantial voting discrimination in recent years," *id.* at 328-30, Congress "had reason to suppose that these States might try ... to evade the remedies for voting discrimination contained in the Act itself," *id.* at 335; H.R. Rep. No. 94-196, at 57-58 (1975). Section 5 thus was a necessary response to the contemporaneous evidence that "minorities were openly denied the right to participate in the political process by State and local officials." H.R. Rep. No. 109-478, at 7 (2006).

Nearly fifteen years later, the Supreme Court again upheld Section 5 as a constitutional exercise of Congress' Fifteenth Amendment enforcement power in *City of Rome v. United States*, 446 U.S. 156 (1980). The city argued that Section 5, "to the extent that it prohibits voting changes that have only a discriminatory effect, is unconstitutional." *Id.* at 173. In particular, Section 1 of

the Fifteenth Amendment "prohibits only purposeful racial discrimination in voting, and . . . in enforcing that provision pursuant to [Section] 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect." *Id.* The Court again upheld Section 5 because "Congress could *rationally* have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Id.* at 177 (emphasis added) (footnote omitted).

Then-Justice Rehnquist dissented, flatly rejecting the idea that "Congress has the authority under its enforcement powers to determine, without more, that electoral changes with a disparate impact on race violate the Constitution, in which case Congress by legislative act could effectively amend the Constitution." *Id.* at 210 (Rehnquist, J., dissenting). As he explained, "[t]his result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government." *Id.* at 211 (citations omitted). The application of the overly-deferential rational basis standard of review was particularly troubling given the lack of evidence of intentional discrimination: "The facts of this case readily demonstrate the fallacy underlying the Court's determination that congressional prohibition of Rome's conduct can be characterized as enforcement of the Fourteenth or Fifteenth Amendment." *Id.* at 207. In the end, "[t]o permit congressional power to prohibit the conduct challenged in this case requires state and local

governments to cede far more of their powers to the Federal Government than the Civil War amendments ever envisioned." *Id.* at 220.

B. *The Court's Rejection of DOJ's Expansive Interpretation of Section 5*

DOJ has repeatedly asked this Court to read Section 5 expansively to protect against any number of discriminatory "effects" far removed from the statute's language, purpose, and constitutionally limited reach. The Court has consistently declined DOJ's invitation. In *Beer v. United States*, 425 U.S. 130 (1976), the Court rejected DOJ's argument that the failure to ensure that a minority group is represented in proportion to its representation in the general population was a basis for denying preclearance under Section 5. Rather, "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of their electoral franchise." *Id.* at 141. Thus, under *Beer*, "[i]f a change resulted in minority voters losing ground, then the change was not entitled to federal approval. On the other hand, if the change retained the existing voting strength of minority voters or increased that voting strength, then the change merited federal approval." Michael J. Pitts, *Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 Pepp. L. Rev. 265, 273 (2005). "A discriminatory purpose (or lack thereof) played no role in the Section 5 effects prong. Motive did not matter." *Id.*

After *Beer*, this Court continued to reject DOJ's various constructions of Section 5. In particular, the Court rejected DOJ's argument that a "clear" violation of Section 2 was a basis for denying preclearance under Section 5. *Bossier Parish I*, 520 U.S. at 481-82. The Court also rejected DOJ's argument that preclearance should be denied if a discriminatory, although non-retrogressive, purpose motivated a voting change. *Bossier Parish II*, 528 U.S. at 328 (explaining that the "language of [Section 5] leads to the conclusion that the 'purpose' prong . . . covers only retrogressive dilution."). "The result of the *Bossier* decisions was that federal review of voting changes was left with little except for the retrogressive effects test." Pitts, 32 Pepp. L. Rev. at 279.

More recently, and of particular importance here, the Supreme Court considered the denial of preclearance to Georgia's post-2000 census redistricting plan in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). As of the 2000 census, Georgia had thirteen majority-minority districts; Georgia's 2000 redistricting plan called for the "unpacking" of black voters from the most heavily concentrated majority-minority districts in order to create more "influence" districts—where black voters could affect the outcome of the elections. Georgia sued in the DDC for preclearance. In objecting to the plan, DOJ focused on three of Georgia's thirteen majority-minority districts; in these three districts, minority representation in the voting population was slightly reduced by the redistricting plan. Indeed, the percentage of black registered voters in each of these three districts dropped just below 50%. DOJ thus concluded that the plan was retrogressive. *Id.* at 472-73. The district court agreed.

The Supreme Court reversed the decision and remanded the case to the district court. After reiterating that preclearance should be denied where the voting change "'would lead to a retrogression in the position of racial minorities with respect to the effective exercise of their electoral franchise,'" *Ashcroft*, 539 U.S. at 466 (quoting *Beer*, 425 U.S. at 141), the Court, for the first time, gave meaning to the "effective exercise of the electoral franchise" language of *Beer*, *id.* at 480. The Court outlined a "totality of the circumstances" retrogression test, under which retrogression depends upon "all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, [and] the extent of the minority group's opportunity to participate in the political process . . . ." *Id.* at 479-80. Retrogression analysis thus demands a subtle examination of a minority group's ability to elect candidates of its choice in "safe" and "coalition" districts, the group's ability to contribute to the outcome of elections in "influence" districts, the group's support for (or opposition to) minority incumbent representatives, and the political clout of those representatives. *Id.* at 482-85.

Ashcroft represented an important shift in the Section 5 inquiry away from the "straightforward" but problematic *Beer* retrogression test. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum. L. Rev. 1710, 1718 (2004) ("No reading of the plurality opinion in *Ashcroft* can fail to recognize that the Court substituted a highly nuanced totality-of-the-circumstances approach for the relatively rigid *Beer* retrogression test."); Richard L. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv.

L. Rev. 28, 96 (2004) (describing *Ashcroft* as "the most important decision in a generation on race and political equality" for replacing "a single, mandatory remedial regime with one that defines general objectives but leaves representative bodies, with black participation, more flexibility in choosing the means to realize those aims in varied contexts.").

C. *The 2006 Voting Rights Act Reauthorization Amendments*

In 2006, Congress reauthorized the VRA for another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act and Reauthorization Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006). Congress amended Section 5 to allow a change to a voting system only if it "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a) (2006). Importantly, new Section 5 also included subsections (b) through (d), which provide:

> (b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the *ability* of any citizens of the United States on account of race or color . . . *to elect* their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.
>
> (c) The term "purpose" in subsections (a) and (b) of this section shall include *any discriminatory purpose.*

> (d) The purpose of subsection (b) of this section is to protect the *ability* of such citizens *to elect* their preferred candidates of choice.

Id. (emphases added).

By adding the "ability to elect" language, Congress cast aside this Court's "totality of the circumstances" test and returned "the retrogression inquiry to what it was under the *Beer v. United States* standard." Persily, 117 Yale L.J. at 234; David T. Canon, *The Future of the Voting Rights Act*, 6 Election L.J. 266, 267 (2007) ("Congress did not follow this advice on flexibility, but rather restored the pre-*Georgia v. Ashcroft* retrogression standard."). Indeed, Congress left no room for doubt as to its objective. H. R. Rep. No 109-478, at 71 ("[T]he Committee makes clear that Congress explicitly rejects all that logically follows from Justice O'Connor's statement [from *Georgia v. Ashcroft*] that 'In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice.'").

II. NEW SECTION 5 DOES NOT "ENFORCE" THE FIFTEENTH AMENDMENT.

The 43 years since the passage of the VRA have worn away the "exceptional conditions" and "unique circumstances" that justified Section 5 as legislation enforcing the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 334-35. Indeed, there is no evidence that the States subject to preclearance under Section 5 any longer deserve to be singled out for special federal supervision. New Section 5's stringent preclearance

remedy cannot pass constitutional muster, even under the pre-*Boerne* rational basis standard. New Section 5, which is entirely divorced from the Fifteenth Amendment's ban on intentional discrimination, certainly cannot withstand *Boerne*'s more stringent standard of review.

A. *The Limits Of Congress' Fifteenth Amendment Enforcement Authority*

Boerne was a pathbreaking decision that placed real limits on Congress' enforcement authority under the Fourteenth and Fifteenth Amendments. The decision arose from Congress' attempt to overrule the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the First Amendment allows laws of general applicability to "be applied to religious practices even when not supported by a compelling government interest," *Boerne*, 521 U.S. at 514 (citing *Smith*, 494 U.S. at 885). Dissatisfied with the Court's interpretation of the First Amendment, Congress enacted the Religious Freedom Restoration Act ("RFRA"), declaring that government may *not* burden an individual's exercise of religion unless it can demonstrate that it used the least restrictive means to further a compelling government interest. *Id.* at 515-16 (citing 42 U.S.C. § 2000bb-1).

The Court struck down RFRA as exceeding Congress' power. In so doing, the Court cast aside the rational basis standard for determining whether legislation qualified as a legitimate exercise of Congress' Fourteenth Amendment enforcement authority. Starting from first principles, the Court emphasized that the

Constitution vests Congress with *enumerated* powers; "congressional enforcement power . . . is not unlimited." *Id.* at 518. Congress' authority "extends only to enforc[ing] the provisions of the Fourteenth Amendment." *Id.* at 519. Simply put,

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'

Id.

The Court explained that the limits of Congress' "enforcement" authority are judged by whether there are "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* at 520; David S. Day, *New Dimensions of Section 5 Enforcement Power*, 47 S.D. L. Rev. 366, 384 (2002) (explaining that *Boerne* and its progeny changed "the standard: from the deferential rational basis test to the non-deferential, searching scrutiny standard"). "The bottom line is that the Court has shifted its enforcement power doctrine away from the rationale explicated by the majority in *City of Rome* and has more or less adopted Justice Rehnquist's dissent in that case." Pitts, 32 Pepp. L. Rev. at 290.

With regard to RFRA, the Court concluded that to satisfy the "congruent and proportional" standard the legislation must either remedy past unconstitutional discrimination by States or prevent such discrimination. RFRA, however, could not "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. The Court found that "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry," mentioning "no episodes [of religious persecution] occurring in the past 40 years." *Id.* at 530. The Court recognized that Congress impermissibly sought to change the substantive constitutional standard; not simply to enforce the existing right against religious discrimination. *Id.* at 534-35. The Court stuck down the law.

B. *New Section 5 Cannot Survive Review Under Boerne*

This Court's "congruent and proportional" test allows it to determine whether Congress, here, is actually enforcing the substantive guarantees of the Fifteenth Amendment or is instead abusing that authority to impose a new standard of voting fairness.[4] As explained below, new Section 5 bears no relation, either factually or legally, to the legislation enacted by Congress in 1965. The statute no longer focuses on eradicating the

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[4] The enforcement clauses of the Fourteenth and Fifteenth Amendment are co-extensive. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment.").

intentional acts of discrimination that the Fifteenth Amendment bans; rather, Congress is simply imposing on the States its preferred, and openly race-based, electoral system. New Section 5, which lacks evidence supporting the extension of a federal veto over state election law changes for another 25 years *and* substantively redefines the injury confronted by the Fifteenth Amendment, truly is a "federalism-and-separation-of-powers double-whammy." App. Br. 23.

1. Congress Failed to Produce Evidence That New Section 5 Was Necessary to Enforce the Fifteenth Amendment.

Because remedies rightfully exist only where there is a need to correct some wrong, the first step in determining whether a statute qualifies as valid "enforcement" legislation is to "identify with some precision the scope of the constitutional right at issue." *Bd. of Trs. Of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). As noted above, because Section 5 was enacted pursuant to the Fifteenth Amendment, the injury to be redressed is intentional racial discrimination by a state actor with regard to voting. *Bolden*, 446 at 61. The key question therefore is whether Congress identified a "modern" pattern of intentional discrimination in voting practices sufficient to trigger its Fifteenth Amendment enforcement authority. *Boerne*, 521 U.S. at 530. It did not.

The "exceptional conditions" and "unique circumstances" identified by the Court in *Katzenbach*, and relied upon by Congress in 1965, no longer exist. In passing new Section 5, Congress acknowledged that

significant progress has been made in eliminating first-generation barriers, and that minority vote registration, turnout, and representation have all increased substantially. H.R. Rep. No. 109-478, at § 2(b)(1), 120 Stat. 577. In the states entirely covered by Section 5, African-American voter registration and turnout percentages are higher than whites' in three instances and on par with whites' in the remaining states; in all, African-Americans in these states have higher registration and turnout numbers than *any* racial group outside covered jurisdictions. Charles S. Bullock & Ronald Keith Gaddie, *The Bulluck-Gaddie Voting Rights Studies: An Analysis of Section 5 of the Voting Rights Act*, American Enterprise Institute (2006), Addendum: *Impact of Using Non-Hispanic White Data*, 3-11 (June 6, 2006) ("Bullock-Gaddie Studies"); U.S. Comm'n on Civil Rights, *Reauthorization of the Temporary Provisions of the Voting Rights Act* Report 35-36 (April 2006).

The experience in Alabama illustrates this point. App. Br. 4-6. Whereas "[p]rior to 1965, the black registration rate in the State of Alabama lagged behind that of whites in that State by 49.9 percentage points" and "[i]n 1972, that disparity [remained at] 23.6 percentage points," H.R. Rep. No. 94-196, at 6 (1975), by 2004, the gap had vanished almost entirely. Today, black registration in Alabama is within a single percentage point of white registration, and black turnout is roughly a percentage point higher than white turnout. S. Rep. No. 109-295, at 11; U.S. Census Bureau, Voting and Registration in the Election of November 2004, Table 4a. As one study concluded, "Alabama, which had nearly as far to go as Mississippi along the path of voting

rights, has made tremendous strides in black voter participation and in descriptive representation." Bullock-Gaddie Studies Addendum: *Impact of Using Non-Hispanic White Data*, at 15. Moreover, the "effort at black voter mobilization has translated into significant gains in terms of descriptive representation .... Black state legislators are elected roughly in proportion to the eligible electorate. These black legislators have held positions of power and influence within their chambers." *Id.*

For these reasons, Congress was confronted with expert testimony repeatedly warning that it "would be hard-pressed to discover the same kinds of discriminatory voting practices that our predecessor[s] ... encountered—the kinds of discriminatory practices documented in that 1961 report and others like it." Gerald A. Reynolds, *Reauthorization of the Voting Rights Act: Policy Perspectives and Views from the Field*; Testimony Before the House Commission on the Judiciary, Subcommittee on the Constitution (June 21, 2006) ("Reynolds Testimony"); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 Ohio St. L.J. 177, 179 (2005) ("I see very little in the DOJ evidence that Congress could use to support a case for a renewed Section Five").

In fact, the testimony concerning proof of unconstitutional discrimination demonstrated that there were six such instances against minorities between 1982 and 2006 in covered states, six more in non-covered states, and six more involving discrimination against whites. S. Rep. No. 109-295, at 13. Thus, the expert

testimony concluding that "there is no crisis in minority voting rights in 2006 compared to what there was in 1965 when the act was passed or in subsequent years" was basically uncontested. Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act*, American Enterprise Institute 2-3 (May 17, 2006) ("Blum & Campbell").

Nevertheless, Congress reauthorized for 25 more years because "40 years has not been a sufficient amount of time." Pub. L. 109-246 § 2(b)(7). In so doing, Congress rested its judgment on the following record evidence:

> 1. "[T]he hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength."
>
> 2. "[T]he number of requests for declaratory judgments [for preclearance] denied by the United States District Court for the District of Columbia."
>
> 3. "[T]he continued filing of section 2 cases that originated in covered jurisdictions."

> 4. The "tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the Voting Rights Act of 1965."

Id. § 2(b)(4) & (b)(8), 120 Stat., at 577-78. Despite Congress' citation to these findings as "[e]vidence of continued discrimination" against racial minorities, *id.* § 2(b)(4), any modest level of scrutiny completely undermines this claim.

First, Section 5 objections and Section 2 litigation are inapt proxies for intentional discrimination. For instance, the Attorney General regularly objects to annexation or redistricting schemes that do not maximize the number of majority-minority districts, that do not protect white candidates from minority competition and vice versa, and that do not guarantee reserved African-American and Hispanic seats, none of which bears any relation to unconstitutional conduct. Hasen, 66 Ohio St. L.J. at 192-93. In fact, it probably signals the opposite. *Miller*, 515 U.S. at 924-27; *Bolden*, 446 U.S. at 66-67, 74. In any event, more successful Section 2 actions have taken place in non-covered jurisdictions than in covered ones since 1982. Blum & Campbell at 11; Edward Blum, *Section 5 of the Voting Rights Act: The Importance of Pre-Clearance*, Testimony Before the House Committee on the Judiciary, Subcommittee on the Constitution, at 2 (Oct. 25, 2005) ("Blum Testimony").

Congress' faulty reasoning aside, the number of objections is itself miniscule even if every one of the Attorney General's objections were based on unconstitutional conduct; 0.7% of all submissions resulted in an objection between 1982—when Section 5

was last reauthorized—and 2004. Reynolds Testimony (June 21, 2006). In 2003, 0.17% of submissions received an objection, 0.06% received one in 2004, and 0.03% received one in 2005. Blum & Campbell 11; Persily, 117 Yale L.J. at 199-200. This evidence alone should be sufficient to conclude that intentional discrimination is no longer a widespread problem in the covered jurisdictions. Blum & Campbell 10 ("No valid argument can be made to extend Section 5 based on the number of objections; the number of objections has reached an all-time low while black voter participation and minority elected officials numbers have soared.").[5]

Advocates for Section 5's renewal relied on other evidence of discrimination; however, Congress did not rely on it and, in any event, it would have failed to disclose the kind of pervasive intentional discrimination found in connection with previous authorizations of the Act. Because there are no more poll taxes, literacy tests, grandfather clauses, or other examples of systemic voting abuses on the basis of race, new Section 5's advocates relied in Congress on the presence of racial bloc/polarized voting, *see, e.g.*, Laughlin McDonald & Daniel Levites, ACLU, *The Case for Extending and Amending the Voting Rights Act* 9-14 (2006) ("ACLU Report"), H.R. Rep. No. 109-478, at 34-35; and "hostility to minority political participation," as evidenced by the

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[5] Because the DDC uses the same standards as DOJ and does not require a showing of unconstitutional conduct in order to invoke Section 5's requirements, resort to those statistics proves no more useful. Nor does the evidence of federal observers being dispatched to monitor elections; the statute requires only complaints regarding unequal voting opportunities, not evidence of intentional discrimination. 42 U.S.C. § 1973f(a).

"unpacking" of majority-minority districts into "coalition" or "influence" districts at issue in *Ashcroft*, ACLU Report at 14-16; as evidence of intentional discrimination. Racially polarized voting is not evidence of unconstitutional discrimination and is of no relevance where not accompanied by evidence of discriminatory intent. *Bolden*, 446 U.S. at 64.

And, ironically, Section 5 *depends* on racially polarized voting by focusing entirely on the racial makeup of a given district to determine the minority community's ability to elect the candidate of its choice. For this reason, the "unpacking" of majority-minority districts was explicitly found to be of a legitimate *benefit* to racial minorities in *Ashcroft*. 539 U.S. at 481 (explaining that "spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice" and "has the potential to increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group.") (citation omitted).

Finally, although Congress did not even try, it could not have relied on acts of unconstitutional conduct from previous decades to justify the new Section 5. *Bolden*, 446 U.S. at 74 ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."). Rather, only "modern" acts of systemic voting abuses *in the covered jurisdictions meaningfully greater than those in non-covered jurisdictions* could sustain legislation as far-reaching as new Section 5. No such evidence exists. Blum Testimony

at 2 ("[A]pplying the same methods of analysis that we used on the covered jurisdictions to non-covered states such as Tennessee, Arkansas, and New Mexico ... reveals no difference between them."). The "unremitting and ingenious defiance of the Constitution" that supported the need for Section 5 is in the past. *Katzenbach*, 383 U.S. at 309.

Indeed, Congress was completely silent as to why preclearance remains necessary where (1) the other protections of the Voting Rights Act remain; (2) there is no showing of jurisdictions continually staying one step ahead of the law; (3) there is no evidence that traditional litigation would be insufficient to vindicate constitutional rights; and (4) there is equal or greater evidence of intentional discrimination outside of covered states as within them. Given Congress' failure to offer a concrete argument for why *only* the preclearance model of new Section 5 would do, speculation that the gains made would dissipate in the absence of Section 5 is entirely unfair. Issacharoff, 104 Colum. L. Rev. at 1731 (explaining that "[i]f the burden for change is certainty of outcome, then the status quo always prevails" and that it is likely that "the combination of section 2 of the Voting Rights Act, the protections of the Fourteenth Amendment, and the fact of being in the process and at the table would afford much protection").[6]

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[6] Congress' failure to consider a less intrusive means of protecting voting rights further illustrates that Congress did not heed this Court's warning that enforcement legislation must, over time, "be adapted to the mischief and wrong which the [Fifteenth] Amendment was intended to provide against," *Boerne*, 521 U.S. at 532 (quotation omitted).

This Court has consistently recognized that Section 5 imposes a heavy toll on federalism. *Bossier Parish II*, 528 U.S. at 336; *Lopez*, 525 U.S. at 282; *Bossier Parish I*, 520 U.S. at 481. The "federalism costs exacted by § 5 preclearance" were understandably justified "as a necessary and constitutional response to some States' 'extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.'" *Miller*, 515 U.S. at 926 (quoting *Katzenbach*, 383 U.S. at 335). However, this "does not mean they can be justified" absent the factual predicate that necessitated the enactment of Section 5 over 40 years ago. *Id.* at 926-27. Given the failure of Congress to produce any evidence akin to the deplorable acts of discrimination that prompted the passage of the VRA, new Section 5 is no longer a defensible deviation from our federal system.

2. New Section 5 Does Not Redress Intentional Discrimination.

Even if the evidence before Congress supported a continued need for a statutory remedy enforcing the Fifteenth Amendment, new Section 5 does not address this concern. As noted above, new Section 5 restored the *Beer* retrogression standard, abandoning the more subtle and flexible approach adopted in *Ashcroft*. Persily, 117 Yale L.J. at 234 ("By adding the words 'ability . . . to elect' to the new section 5, Congress attempted to overrule *Georgia v. Ashcroft* and return the retrogression inquiry to what it was under the *Beer v. United States* standard."). Under *Beer*, however, it was

irrelevant whether the change in law was prompted by a discriminatory motive; preclearance did

> *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.

Bossier Parish II, 528 U.S. at 335.

Thus, as this Court explained, preclearance could not be denied to a plan "that is *not* retrogressive—*no matter how unconstitutional it may be* . . . ." *Id.* at 335-36. Indeed, this Court expressly recognized that the *Beer* test was not congruent with the Fifteenth Amendment: "Even if § 5 did not have a different baseline than the Fifteenth Amendment, appellants' argument that § 5 should be read in parallel with the Fifteenth Amendment would fail for the simple reason that we have never held that vote dilution violates the Fifteenth Amendment." *Bossier Parish II*, 528 U.S. at 334 n.3. Thus, as implicitly recognized by this Court, new Section 5 is not "parallel" to the Fifteenth Amendment. Pitts, 32 Pepp. L. Rev. at 281 (explaining that *Boerne* "stemm[ed] from the Court's unwillingness to allow Congress to use its enforcement power to legislate a complete shift in constitutional norms" and that "the paradigm of such a complete shift would appear to occur when Congress substitutes a pure effects test for a constitutional purpose test").

Rather than enforcing the Fifteenth Amendment, new Section 5 is "merely an attempt to substantively redefine the States' legal obligations with respect" to voting practices. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000). That is, Congress strengthened Section 5, not because "more elaborate measures" would be needed "in order to satisfy the clear commands of the Fifteenth Amendment," *Katzenbach*, 383 U.S. at 309, but because Congress decided that its policy goals could not be implemented under the statute as previously written. This Congress may not do. *Id.* at 326 ("On the rare occasions when the Court has found an unconstitutional exercise of [the 15th Amendment's enforcement] powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment."). Congress' goal of ensuring the "*ability* of . . . citizens *to elect* their preferred candidates of choice," 42 U.S.C. § 1973c(b), has nothing to do with the Fifteenth Amendment.[7]

Indeed, by rejecting the "totality of circumstances" approach adopted in *Ashcroft*, Congress ensured Section 5's constitutional infirmity. *Ashcroft* introduced at least some measure of discriminatory purpose into the Section 5 inquiry; that is, while *Ashcroft* certainly did not bring

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[7] Though "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional," *Boerne*, 521 U.S. at 532, the same cannot be said where there is no indication that the congressional enactment reaches *any* unconstitutional conduct. *Rome*, 446 U.S. at 202 (Powell, J., dissenting); *id.* at 213 (Rehnquist, J., dissenting); *Lopez*, 525 U.S. at 296 (Thomas, J., dissenting).

Section 5 exactly in line with the constitutional standard, "[s]ome of the evidentiary factors that [it] adds to the retrogression test look more like factors that would help to determine whether a discriminatory purpose was at work." Pitts, 32 Pepp. L. Rev. at 301 (2005). In particular, "[t]he consideration of the views of minority legislators is the new factor that most clearly seems to put an element of purpose into the Section 5 effects test." *Id.* Moreover, "widespread minority support for the change seemingly gives an imprimatur that purposeful discrimination was not at work in the adoption of the voting change." *Id.* at 302.[8]

By overturning *Ashcroft*, and replacing its test with a standard that "unnecessarily infuse[s] race into virtually every redistricting," new Section 5 "rais[es] serious constitutional questions." *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2625 (2006) ("*LULAC*"). Because of the 2006 amendments, Section 5 can no longer be "properly interpreted" as "encourage[ing] the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Ashcroft*, 539 U.S. at 491. Congress thus left this Court no choice but to strike down the law.

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[8] In addition, "the inquiry into influence districts will look to whether candidates actively seek minority votes and, more importantly, after seeking those votes, whether the candidates assist their minority constituents or vote in favor of issues minority voters overwhelmingly support." Pitts, 32 Pepp. L. Rev. at 302. That is, "this amounts to a purpose-type analysis because it will look at whether legislators elected with minority support are just using those voters to get elected without providing some tangible benefits once assuming office." *Id.*

Boerne, 521 U.S. at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'") (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

III. NEW SECTION 5 CANNOT BE RECONCILED WITH THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT.

At a more fundamental level, new Section 5 is unconstitutional because it *requires* discrimination on the basis of race in violation of the Fourteenth Amendment. The "central mandate" of the Equal Protection Clause "is racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904 (citations omitted). This constitutional ban on racial discrimination "obtains with equal force regardless of 'the race of those burdened or benefited by a particular classification,'" *id.* at 904 (quotation omitted), and applies to both the Federal and State governments, *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). Moreover, the equal protection guarantee of the Fourteenth Amendment fully extends to federal and state voting laws. *Shaw*, 509 U.S. at 649; *Miller*, 515 U.S. at 905;*Wright v. Rockefeller*, 376 U.S. 52, 56 (1964).

Indeed, this Court has made clear that voting laws that make race the "predominant, overriding factor" violate the Equal Protection Clause. *Miller*, 515 U.S. at

920; *LULAC*, 126 S. Ct. at 2664; *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). The tension between the Equal Protection Clause and Section 5 of the VRA has been evident for some time. *Beer*, 425 U.S. at 141 (concluding that a redistricting plan valid under Section 5 is invalid if it "so discriminates on the basis of race or color as to violate the Constitution"); *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment . . . seem to be what save it under § 5."); *LULAC*, 126 S. Ct. at 2625 (explaining that the "infus[ion] of race into virtually every redistricting rais[es] serious constitutional questions").

New Section 5 openly makes race the "predominant" factor in deciding whether preclearance should be granted and, therefore, cannot pass constitutional muster. As detailed above, new Section 5 prohibits any voting change that "will have the effect of diminishing" a minority group's "ability . . . to elect [its] preferred candidates of choice." 42 U.S.C. § 1973c(b), (d). New Section 5, therefore, fossilizes current minority percentages in all covered voting districts for 25 years regardless of changes in facts and circumstances. In so doing, Section 5 not only prevents the intentional dissolution of majority-minority districts and requires the creation of such districts when others naturally dissipate—it expressly prevents *any* diminution in minority voting percentages.

For example, under new Section 5, "[i]f a 25% minority district has a 10% chance of electing the minority-preferred candidate . . . section 5 would prevent decreasing the minority percentages in a way that might

reduce the candidate's chances of election from slim to none." Persily, 117 Yale L.J. at 245. Similarly, "it would be retrogressive to replace a district with a 100% probability of electing the minority's preferred candidate with one with only a 90% probability, without compensating for the drop elsewhere in the plan." *Id.* As a result, Section 5 "broaden[s] the retrogression inquiry to include any district where minorities have some chance of electing their preferred candidates." *Id.* at 244-45. By changing the focus of retrogression solely to maintaining minority voting percentages, Section 5 ensures that race is the predominant, perhaps the only, factor influencing redistricting plans in covered jurisdictions.

In past cases, the Court has successfully avoided this constitutional thicket by rejecting DOJ's overly broad construction of Section 5. In *Miller*, for example, DOJ defended a redistricting plan where "[r]ace was . . . the predominant, overriding factor," 515 U.S. at 920, as necessary to comply with Section 5, *id.* at 922. In rejecting this race-based "maximization policy," under which DOJ required "States to create majority-minority districts wherever possible," as beyond the command of Section 5, the Court explained that such a plan raised "serious constitutional concerns." *Id.* at 925-26. DOJ's "implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, into tension with the Fourteenth Amendment." *Id.* at 927 (internal citations omitted). Because the Court rejected DOJ's "interpretation of the statute," it was able to "avoid the constitutional problems that interpretation raises." *Id.* (citations omitted).

DOJ then insisted, when the case returned to the Court, that the redistricting plan rejected in *Miller* was the "baseline" for determining whether the revised plan was retrogressive. *Abrams v. United States*, 521 U.S. 74, 95 (1997). The Court disagreed; the "1992 plan, constitutional defects and all, [could not] be the benchmark." *Id.* at 97. "Section 5 cannot be used to freeze in place the very aspects of a plan found to be unconstitutional." *Id.* at 97. Together, *Miller* and *Abrams* make clear that compliance with Section 5 is not a legitimate basis for drawing racially gerrymandered voting plans. Such a practice would allow Congress to read the Fourteenth Amendment out of this Court's voting rights jurisprudence.[9]

New Section 5, however, does just that. Congress has revived almost every race-focused DOJ construction of Section 5 struck down by this Court as constitutionally problematic over the last 30 years; the statute clearly makes race the predominant factor in every redistricting decision. Put simply, new Section 5 requires covered jurisdictions to violate the Fourteenth Amendment in order to comply with a statute. In a contest between the

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[9] Given *Abrams*, the district court's reliance on the state law struck down by the Alabama Supreme Court as the baseline for the Section 5 retrogression inquiry was plain error. App. Br. 35-38. The law was never "in effect" for purposes of Section 5. *Abrams*, 521 U.S. at 97. Moreover, allowing a precleared, but concededly unconstitutional, state law to serve as the retrogression baseline under Section 5 grants DOJ a supervisory role of state courts that cannot be squared with basic principles of federalism and separation of powers. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting)

two, the statute must give way. "There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

CONCLUSION

For the reasons set forth herein, the judgment of the district court should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

HONORABLE BOB RILEY, AS GOVERNOR OF THE STATE OF ALABAMA,

Appellant,

v.

YVONNE KENNEDY, JAMES BUSKEY AND WILLIAM CLARK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR ABIGAIL THERNSTROM AND STEPHAN THERNSTROM AS AMICI CURIAE SUPPORTING APPELLANT

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INTEREST OF THE *AMICI CURIAE*

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The Thernstroms' extensive scholarship includes *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Harvard University Press 1987), *America in Black and White: One Nation, Indivisible* (Simon & Schuster 1997), *Beyond the*

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[1] The parties have consented to the filing of this brief, and their consent forms have been filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

Color Line: New Perspectives on Race and Ethnicity (Hoover Institution Press 2002), *No Excuses: Closing the Racial Gap in Learning* (Simon & Schuster 2003), and the forthcoming works *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections* and *Don't Call it Segregation: The Myth of American Apartheid.*

Numerous organizations have recognized the Thernstroms' contributions, including the Bradley Foundation, which awarded them one of its four 2007 prizes for "outstanding intellectual achievement." Members of this Court have likewise cited the Thernstroms' scholarship. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2776-77 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 371 (2003) (Thomas, J., joined by Scalia, J., concurring); *Lopez v. Monterey County*, 525 U.S. 266, 297 (1999) (Thomas, J., dissenting); *Johnson v. De Grandy*, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring); *Bush v. Vera*, 517 U.S. 952, 1075 n.9 (1996) (Souter, J., joined by Ginsburg, J., and Breyer, J., dissenting); *Holder v. Hall*, 512 U.S. 874, 894-95 (1994) (Thomas, J., joined by Scalia, J., concurring); *Shaw v. Reno*, 509 U.S. 630, 640 (1993).

Abigail and Stephan Thernstrom would like once again to offer their views to this Court. As scholars long concerned with race and voting in America, the Thernstroms have an interest in highlighting the confusion that has developed in the application of the Voting Rights Act and in ensuring that the Voting Rights Act provides a consistent, predictable framework for the States, federal government, and courts. The Thernstroms

accordingly are filing this brief to aid the Court in its resolution of this case.

INTRODUCTION

Appellant's brief thoroughly sets forth the arguments that the preclearance requirements of the Voting Rights Act do not apply to purely judicial decisions of state supreme courts. Instead of repeating those arguments here, this brief offers an additional ground for reversing the district court's decision.

In 2004, the Department of Justice precleared Act No. 2004-455, which provides that when a vacancy arises on a county commission, the default rule is gubernatorial appointment. In 2005, a vacancy arose on the Mobile County Commission. The Alabama State Supreme Court, interpreting Act No. 2004-455, held that the vacancy must be filled pursuant to the precleared default rule of gubernatorial appointment. Amici submit that the Alabama Supreme Court's 2005 decision did not constitute a change from the most recent precleared statute in force or effect, *i.e.*, Act No. 2004-455. Accordingly, the district court's decision should be reversed.

SUMMARY OF RELEVANT FACTS

The parties detail a series of state statutes, court rulings, appeals, county special elections, gubernatorial appointments, and Department of Justice preclearance decisions extending from the 1980s to the present. Amici, however, believe that

this Court need only consider those events occurring since 2004 to resolve this appeal.

On May 14, 2004, Alabama enacted Act No. 2004-455, a general law governing vacancies on county commissions in Alabama. Joint Appendix ("J.A.") 115-17. The Act's preamble explains that the Act's purpose is "to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of county commission." *Id.* at 116. The Act amended Alabama law to state, "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor." *Id.*

Alabama submitted Act. No. 2004-455 to the Department of Justice for preclearance, with a letter explaining that Act 2004-455 "will allow local law to provide for special elections to fill vacancies in the office of county commissioner." Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Aug. 8, 2004). The Department of Justice's preclearance letter, dated September 28, 2004, included only one sentence describing Act No. 2004-455: It stated that Act No. 2004-455 is a statute "which permits the filling of county commissioner vacancies by special election, for the State of Alabama." Letter from Joseph D. Rich, Chief, Voting Rights Section, Civil Rights Division, to Charles B. Campbell, Esq., Assistant Attorney General of Alabama (Sept. 28, 2004).

During 2004 and 2005, there was confusion over the application of Act No. 2004-455. On September 7, 2004, Alabama Attorney General Troy

King issued an opinion letter stating that Act No. 2004-455 allowed Houston County to hold a special election pursuant to a local law enacted before 2004. Letter from Troy King, Attorney General of Alabama, to Rep. Steve Clouse, House of Representatives of Alabama (Sept. 7, 2004); *see also* J.A. 49. On April 26, 2005, Etowah County filled a county commission vacancy by special election, pursuant to a local law enacted before 2004. J.A. 49 (citing website of Secretary of State of Alabama).

Controversy arose in September 2005, when a vacancy arose on the Mobile County Commission. On September 19, 2005, Appellees Yvonne Kennedy, James Buskey, and William Clark filed suit against Governor Bob Riley in the Circuit Court of Montgomery County, Alabama. J.A. 21. They requested a declaratory judgment that the vacancy on the Mobile County Commission be filled by special election pursuant to a state statute enacted in 1985, *i.e.*, Act No. 85-237. *Id.* Governor Riley argued that the 1985 state statute could not provide a basis for a special election, because it had been held unconstitutional by the Alabama Supreme Court's 1988 decision in *Stokes v. Noonan*. *See* Jurisdictional Statement Appendix ("J.S. App.") 26a.

The Alabama Circuit Court ruled for the plaintiffs on September 29, 2005, and ordered the vacancy to be filled by special election. J.A. 21. On October 11, Governor Riley appealed the decision to the Alabama Supreme Court. *See* J.S. App. 26a. In the meantime, the Mobile County probate judge (who is the chief election official for the county) approved a special-election plan designed to implement the

circuit court's decision and, on October 13, submitted it to the Department of Justice for preclearance. J.A. 22; Letter from J. Michael Druhan, Jr., to Chief, Voting Rights Section, Civil Rights Division (Oct. 13, 2005). On October 25, Alabama Attorney General Troy King asked the Department of Justice to "withhold action on the merits of [the] Probate Judge['s] submission pending action by the Alabama Supreme Court." Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Oct. 25, 2005). The letter noted that Department of Justice regulations provide that the Attorney General will not consider a submission concerning a change "'prior to final enactment or administrative decision,'" and the circuit court's order for a special election was not final because it was still "subject to . . . reversal by the Alabama Supreme Court." *Id.* (quoting 28 C.F.R. § 51.22). The Department of Justice declined to wait for the Alabama Supreme Court's ruling, and on October 26, it precleared the special-election plan submitted by the probate judge. J.A. 22.

On November 9, 2005, the Alabama Supreme Court reversed the circuit court's decision and held that the vacancy on the Mobile County Commission must be filled by gubernatorial appointment. J.S. App. 25a. The court adopted neither Appellees' nor the Governor's reading of Act No. 2004-455. Instead, it held "that Act No. 2004-455 applies prospectively only," and authorizes special elections only pursuant to laws enacted after Act No. 2004-455 took effect. *Id.* at 30a-31a. Because the statute providing for special elections in Mobile County, Act No. 85-237, was enacted in 1985, it did not constitute

"a local law [that] authorizes a special election" under the 2004 statute. J.A. 115-17; J.S. App. 30a-31a. The Alabama Supreme Court explained that for decades, it "has consistently held that statutes are to be prospective only, unless clearly indicated by the legislature." J.S. App.39a-30a (internal quotation marks and citations omitted). Moreover, the court reasoned that the Act's preamble, which declares that the Act's purpose is "'*to authorize* the Legislature by local law to provide for the manner of filling vacancies,'" "further indicates an intention by the legislature that the Act is to be prospectively applied." *Id.* at 30a (quoting Act No. 2004-455). The court held that under Act No. 2004-455, the vacancy on the Mobile County Commission should be filled by gubernatorial appointment. *Id.* at 31a.

Under Alabama law, the Alabama Supreme Court is the "final arbiter" of the meaning of a state statute. *Ex parte James*, 863 So. 2d 813, 834 (Ala. 2002). Accordingly, Governor Riley adopted the Alabama Supreme Court's interpretation of Act No. 2004-455. On November 15, 2005, pursuant to the most recent precleared statute, Act No. 2004-455, Governor Riley appointed Juan Chastang, an African-American, to fill the vacancy on the Mobile County Commission. J.A. 23.

The state legislature also recognized that the Alabama Supreme Court's interpretation of Act No. 2004-455 was binding. It responded by passing Act No. 2006-342, which Governor Riley approved on April 16, 2006. 2006 Ala. Acts No. 2006-342. Act No. 2006-342 declares that its purpose "is to reenact Act 85-237" and provides that if a vacancy arises on the

Mobile County Commission "with 12 months or more remaining on the term of the vacant seat," the vacancy will be filled by special election. *Id.* The Justice Department has precleared Act No. 2006-342. Letter from Assistant Attorney General Wan Kim, Civil Rights Division, to Troy King, Attorney General of Alabama (July 2, 2007). Accordingly, henceforth, any vacancy on the Mobile County Commission which occurs at least twelve months before the end of the term will be filled by special election.

In the meantime, Appellees Yvonne Kennedy, James Buskey, and William Clark filed the instant lawsuit on November 16, 2005, in the United States District Court for the Middle District of Alabama. J.A. 9-14. They argued that the Alabama Supreme Court's 2005 decision in *Riley v. Kennedy* constituted a change requiring preclearance under section 5 of the Voting Rights Act. Plaintiffs' Trial Brief at 3, 8-9, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.); *see also* J.A. 10-11. Appellees also asserted that the Alabama Supreme Court's 1988 decision in *Stokes v. Noonan* should have been submitted for preclearance. Plaintiffs' Trial Brief at 8, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.); *see also* J.S. App. 5a. Appellees sought only prospective relief: a declaratory judgment that both decisions of the Alabama Supreme Court required preclearance, and an injunction forbidding the Governor to fill the vacancy on the Mobile County Commission unless and until the decisions were precleared. Plaintiffs' Trial Brief at 8-9, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.); *see also* J.A. 11. The State of Alabama argued that neither decision of the Alabama Supreme Court

required preclearance, and the Governor's appointment of Juan Chastang to the Mobile County Commission was proper because it was made pursuant to a precleared statute—Act No. 2004-455. Trial Brief of Governor Riley at 4-6, Kennedy v. Riley, No. 205-cv-01100-MHT-DRB (M.D. Ala.).

On August 18, 2006, the district court held that both decisions of the Alabama Supreme Court require preclearance. J.S. App. 3a-8a. The court explained that to determine whether the Alabama Supreme Court's decision in *Riley v. Kennedy* constituted a change under section 5, it would "compar[e] the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." J.S. App. 6a-7a. The district court acknowledged that in 2004, Alabama enacted, and the Department of Justice precleared, a statute governing vacancies on County Commissions—Act No. 2004-455. *Id.* at 4a-5a. And the district court acknowledged that the *Riley v. Kennedy* decision interpreted only Act No. 2004-455. *Id.* at 5a. The district court did not, however, address whether Act No. 2004-455 was the "baseline." Instead, it held that the 1985 statute providing for special elections to fill vacancies on the Mobile County Commission (Act No. 85-237) constituted the "baseline," and the Alabama Supreme Court's decision in *Riley v. Kennedy* that the 1985 Act "was not rendered enforceable by Act No. 2004-455" constituted a change requiring section 5 preclearance. *Id.* at 7a-8a.

On November 9, 2006, in compliance with the district court's order, the Alabama Attorney General

submitted the state supreme court's decisions to the Department of Justice. Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Nov. 9, 2006). The Department of Justice denied preclearance on January 8, 2007, and on May 1, 2007, the district court vacated Governor Riley's appointment of Juan Chastang to the Mobile County Commission. Appellees' Motion to Dismiss Appendix 2a-8a; J.S. App. 1a-2a. The State of Alabama appealed to this Court on May 18, 2007. J.S. App. 11a-13a.

SUMMARY OF ARGUMENT

In holding that the Alabama Supreme Court's decision in *Riley v. Kennedy* constituted a change under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the district court not only misapplied the law, it also created the potential for confusion and unpredictability in the preclearance process.

The district court set forth the correct legal standard: "Changes are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." J.S. App. 6a-7a (citing *Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997) and *Gresham v. Harris*, 695 F. Supp. 11791, 1183 (N.D. Ga. 1988)); *see also Reno v. Bossier Parish*, 528 U.S. 320, 327 (2000). But it misapplied that standard and designated a 1985 statute as the "baseline" or "benchmark," instead of the most recent precleared statute, *i.e.* Act No. 2004-455. Additional confusion was created by the preclearance of the Alabama Circuit Court's 2005 order for a special

election, despite the fact that the order never had any force or effect. And, in their trial court brief, appellees offered a third proposal for the benchmark—the Alabama Attorney General's 2004 opinion letter. The Court should eliminate this confusion, which too often characterizes the preclearance process, by confirming that the section 5 benchmark is the most recent precleared statute or practice that the State put into force or effect—Act No. 2004-455.

The district court next erred by holding that the Alabama Supreme Court's decision in *Riley v. Kennedy* constituted a change under section 5. This Court should clarify that preclearance is not required when a state supreme court enforces a precleared statute consistent with the statute's plain language, the state's section 5 submission letter, and longstanding state precedent.

If this Court concludes that Alabama may implement the holding in *Riley v. Kennedy* without obtaining preclearance, it need go no further. Such a ruling would be sufficient to uphold Juan Chastang's appointment to the Mobile County Commission, which was made pursuant to Act No. 2004-455 and the order in *Riley v. Kennedy*. It is undisputed that all future vacancies will be filled pursuant to Act No. 2006-342 and Act. No. 2004-455. Accordingly, in such circumstances, this Court need not decide whether an earlier Alabama Supreme Court decision, *Stokes v. Noonan*, required preclearance.

ARGUMENT

I. The Correct Section 5 Baseline Is The Most Recent Precleared Statute, Act No. 2004-455.

The district court correctly defined its inquiry as whether the Alabama Supreme Court's decisions constituted changes requiring preclearance under section 5. J.S. App. 6a. The district court also set forth the correct legal standard: "Changes are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." *Id.* at 6a-7a. And the district court acknowledged that the most recent precleared statute was Alabama's 2004 law, Act No. 2004-455. *Id.* at 4a-5a. Yet, the district court erroneously held that the baseline was a 1985 statute, Act No. 85-237, instead of Act No. 2004-455. *Id.* at 7a.

Given that Act No. 2004-455 was "the most recent practice that is both precleared and in force or effect," the district court's own test required that Act No. 2004-455 be designated as the baseline. *Id.* at 7a (citing *Abrams*, 521 U.S. at 96-97 and *Gresham*, 695 F. Supp. at 1183). Precedents from this Court and lower federal courts, as well as the Department of Justice's own regulations, confirm that Act No. 2004-455 is the proper baseline—not the 1985 statute, the Alabama Circuit Court's 2005 decision, or the State Attorney General's opinion letter of September 7, 2004.

A. The District Court Erred in Holding That The 1985 Statute Is the Baseline.

The district court did not cite any authority supporting its decision to choose a 1985 statute as the baseline instead of the most recent precleared 2004 statute. Nor could it. As this Court has explained, where two precleared laws cover the same disputed practice, the more recent law will serve as the benchmark. *See Bossier Parish*, 528 U.S. at 327 (holding that if a 1992 redistricting plan were precleared, it would replace the 1982 precleared plan as the benchmark); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 172-73 (1985) (holding that the "effect of the Attorney General's preclearance of Act No. 549 was to render [the previously precleared] Act No. 547 . . . null and void" and establish Act No. 549 as the baseline). It is undisputed that Act No. 2004-455 was precleared after Act No. 85-237, and that both acts govern the practice at issue in this case—vacancies on the Mobile County Commission.

The district court's decision to treat the earlier statute as the baseline borders on arbitrary. Alabama had no reason to imagine that the district court would select the 1985 statute as the baseline for evaluating *Riley v. Kennedy*. The decision in *Riley v. Kennedy* did not interpret the 1985 statute. Indeed, the 1985 statute was not in force at the time. If district courts or the Department of Justice are free to designate any statute as the baseline, they can engineer any result that they wish. They need only select a sufficiently different baseline to ensure

that the voting practice is denied preclearance—or a sufficiently similar baseline to ensure that the change is precleared. The Court should not allow such confusion to prevail in the preclearance process.

This Court should confirm that under section 5, the baseline is the most recent precleared statute that addresses the voting practice at issue, and hold that the district court erred in designating Act No. 85-237 as the baseline.

B. The Baseline Is Not The Alabama Circuit Court's 2005 Order And Probate Judge's Plan For A Special Election.

The Alabama Circuit Court's 2005 order for a special election in Mobile County and the probate judge's plan to implement that order cannot serve as the section 5 benchmark, despite the fact that the Department of Justice precleared them.

As this Court has explained, because the circuit court order and probate judge's plan were never put into "'force or effect,'" they cannot constitute a section 5 benchmark. *Young v. Fordice*, 520 U.S. 273, 282 (1997) (quoting 42 U.S.C. § 1973c). In *Young v. Fordice*, Mississippi proposed a "Provisional Plan" for voter registration. The Justice Department precleared the plan, but the state legislature never enacted it. *Id.* at 279. This Court held that even though the Provisional Plan had been precleared, it could not serve as the section 5 baseline because it was never "in force or effect." *Id.* at 283. The Court explained that Mississippi

"abandoned the Provisional Plan as soon as its unlawfulness became apparent," and "[t]he plan was used to register voters for only 41 days, and only about a third of the State's voter registration officials had begun to use it." *Id.* Likewise, the State of Alabama abandoned the circuit court's order and the probate judge's special-election plan as soon as the Alabama Supreme Court declared their unlawfulness, and the State *never* put them into force or effect. Accordingly, under the rule of *Young*, the circuit court's order and probate judge's plan cannot serve as the baseline under section 5. *Id.*; *see also Abrams*, 521 U.S. at 96-97 ("There are sound reasons for requiring benchmarks to be plans that have been in effect.").

The Justice Department's regulations are consistent with this conclusion. Those regulations provide that a plan must have been "used by the jurisdiction" and have been "legally enforceable" to serve as a benchmark under section 5. 28 C.F.R. § 51.54(b) (defining the section 5 "benchmark" as "the voting practice or procedure in effect at the time of the submission . . . the last legally enforceable practice or procedure used by the jurisdiction"). The State of Alabama, however, never "used" the probate judge's special-election plan, and the Alabama Supreme Court confirmed that neither the circuit court's order nor the probate judge's plan were "legally enforceable."

The federal government should not be empowered to force a non-final, erroneous court decision onto a state by first preclearing it, and then designating it as the new section 5 benchmark. This

Court should confirm that a non-final court order that was never put into "force or effect" cannot serve as the baseline under section 5, regardless of whether it was precleared.

C. The Baseline Is Not The Alabama Attorney General's 2004 Opinion Letter.

In their trial court brief, appellees pointed to the Alabama Attorney General's 2004 opinion letter and the special election in Etowah County for the proposition that, for the two elections following preclearance of Act No. 2004-455, Alabama's practice was to treat Act 2004-455 as retroactive. This "practice," they argued, should serve as the baseline, not Act No. 2004-455. Plaintiffs' Trial Brief In Reply 3-4, *Riley v. Kennedy*, No. 205-cv-01100-MHT-DRB (M.D. Ala.).

But this contention lacks merit. The Court has consistently held that where a precleared statute governs the disputed voting practice, that precleared statute constitutes the baseline, even if the jurisdiction violated it in the most recent elections. *See Bossier Parish*, 528 U.S. at 327 (holding that if 1992 redistricting plan was denied preclearance, benchmark for future section 5 inquiries would be the last precleared redistricting plan, not the parish's implementation of the invalid 1992 plan in the previous two elections); *City of Monroe v. United States*, 522 U.S. 34, 35-37 (1997) (per curiam) (holding that benchmark was the most recent precleared statute, as opposed to the city's implementation of invalid local laws for the three

previous decades); *Hampton County Election Comm'n*, 470 U.S. at 172 (declaring baseline to be precleared statute, Act. No. 549, as opposed to county's recent practice of holding an election in violation of that precleared statute); *see also Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986) (defining the section 5 benchmark as the Democratic Party's precleared rule, not the Democratic Party's failure to enforce against violations of that rule in the two most recent elections).

The Justice Department's regulations confirm that the correct benchmark is Act No. 2004-455, not the Alabama Attorney General's opinion letter. The regulations state that under section 5, the "benchmark" shall be "the last *legally enforceable* practice or procedure used by the jurisdiction," 28 C.F.R. § 51.54(b) (emphasis added), not the last practice used by the jurisdiction. Given that opinion letters of the Alabama Attorney General are not legally enforceable, *Henderson*, 641 F. Supp. at 1199 (citing *Hill Grocery Co. v. State*, 159 So. 269 (1935)), whereas precleared state statutes are, *City of Monroe*, 522 U.S. at 37, under the Department's regulations, the correct benchmark is Act No. 2004-455.

Only where there is no precleared statute that can serve as the baseline has this Court looked to the jurisdiction's actual practice. *See Foreman v. Dallas County*, 521 U.S. 979 981 (1997) (defining the baseline as "the procedure used by Dallas County for appointing election judges as of . . . the date on which Texas became a covered jurisdiction," only after

determining that the relevant precleared statute provided no guidance on the standards for appointing judges); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 195 (1996) (defining the baseline as the Republican Party's past practice of not charging a delegate fee, only after determining that the relevant precleared statute was silent on the issue and delegated the issue to "the two parties to determine . . . for themselves.").[2] Accordingly, this Court should confirm that under section 5, the baseline is the most recent precleared statute, not a

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[2] This Court's decisions in *Perkins v. Matthews*, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), are consistent with this principle. Both *Perkins* and *Lockhart* involved section 5 inquiries brought shortly after the jurisdictions became covered by section 5, when *no precleared statute existed* to serve as a baseline. Accordingly, neither decision stands for the proposition that a jurisdiction's unprecleared practice can replace a precleared statute as the baseline.

Moreover, in *Perkins* this Court confirmed that even in such a situation, the Court will typically designate the state's statute as the baseline. In *Perkins*, the Court had two choices for a baseline: the state's actual practice in 1961 and 1965, or the requirement of a 1962 state statute that the state had never followed. The Court explained that ordinarily, it would use the state statute as the baseline, but the evidence was conclusive that the City did not embrace that statute. *Perkins*, 400 U.S. at 440 n.12. Similarly, in *Lockhart*, this Court could have defined the baseline either as the city's consistent practice (from 1917 to 1973), or as a state law that had never been enforced. Citing *Perkins*, the Court chose the former. *Lockhart*, 460 U.S. at 132-33 & n.7. In the instant case, there is a precleared statute to serve as the baseline. Moreover, unlike the jurisdictions in *Perkins* and *Lockhart*, Alabama has enforced Act No. 2004-455.

practice that fails to comply with the terms of that statute.

A contrary rule would be unworkable for several reasons. *First*, such a rule would reward state officials who implement practices in contravention of precleared statutes by freezing those practices as the section 5 benchmark.

Second, the proposed rule would be subject to manipulation by the Justice Department or courts. There would often be multiple, plausible ways to characterize the State's "practice," and "a myriad of benchmarks would be proposed in every case." *Abrams*, 521 U.S. at 97. For example, the Alabama Attorney General's practice in 2004 could be characterized as allowing special elections, or as enforcing those special-election laws that had not been invalidated by a court. Both characterizations are plausible, and it is uncertain which of them the Justice Department or a court would choose—or whether it would choose another characterization entirely.

Finally, such a rule would invite manipulation by local officials. Section 5 inquiries would turn on which local official was first to implement a practice and establish his or her view as the section 5 baseline. The Voting Rights Act should not devolve into a race among local officials to be the first to freeze his or her view as the baseline.

II. The Alabama Supreme Court's Decision In *Riley v. Kennedy* Was A Reasonable Interpretation Of The Most Recent Precleared Statute And Thus Not A Change Under Section 5.

The preclearance provisions of the Voting Rights Act do not apply to *every* voting "standard, practice, or procedure" that a State administers, but "only to proposed changes." *Beer v. United States*, 425 U.S. 130, 138-39 (1976). The facts establish that *Riley v. Kennedy* created no "change" from the most recent precleared statute. The Alabama Supreme Court merely enforced the precleared statute consistent with the statute's plain language, the state's description of the statute in its preclearance submission, and longstanding Alabama precedent.

This Court has established that section 5 does not apply when a state implements a practice consistent with a precleared election law. *City of Monroe* involved a state law that "defers where [local laws] are specific and provides a default rule where they are not." *City of Monroe*, 522 U.S. at 37. In 1968, Georgia enacted, and the Department of Justice precleared, a general law providing that municipal elections would be decided by majority vote unless a municipality had a local law explicitly providing for plurality vote. *Id.* at 35-36. This Court held that a 1990 local law by Monroe County, explicitly providing for majority vote, did not constitute a change under section 5. *Id.* at 37. The Court explained that the practice required by the 1990 law was identical to the practice required by the 1968 precleared statute: majority vote. As the

Court stated, "Since the Attorney General precleared the default rule, Monroe may implement it." *Id.* The Court also emphasized that the state's preclearance submission gave the Attorney General "an adequate opportunity to determine the purpose [and effects] of . . . the default rule." *Id.* at 39.

Similarly, Act No. 2004-455 defers where a local law is specific, but otherwise provides a default rule. The Alabama Supreme Court's decision in *Riley v. Kennedy* merely enforced the default rule of gubernatorial appointment, consistent with decades of Alabama precedent and the statute's plain language. J.S. App. 29a-30a (explaining that the Alabama Supreme Court "has consistently held that statutes are to be prospective only," and this conclusion is confirmed by the Act's preamble). Moreover, the court's ruling is consistent with Alabama's preclearance submission letter to the Department of Justice, which explains that Act No. 2004-455 "*will allow* local law to provide for special elections to fill vacancies in the office of county commissioner." Letter from Troy King, Attorney General of Alabama, to Chief, Voting Rights Section, Civil Rights Division (Aug. 8, 2004) (emphasis added). Accordingly, this Court should hold that under *Monroe*, the Alabama Supreme Court's decision in *Kennedy v. Riley* does not constitute a change requiring preclearance. *See also Lake v. State Bd. of Elections of North Carolina*, 798 F. Supp. 1199, 1204-05 (M.D.N.C. 1992) (holding that a state court order, pursuant to precleared statute, to keep polls open for an additional hour did not constitute a change requiring preclearance

because "[t]he order effected no change, but merely mirrored a previously precleared statute").

The court in *Ritter v. Bennett*, 23 F. Supp. 2d 1334 (M.D. Ala. 1998), set forth a workable test for evaluating whether a state's implementation of a precleared statute constitutes a change: Courts will defer to the interpretation of a precleared statute offered by the state authority with responsibility for interpreting that statute, so long as it is reasonable and does not change the statute's plain meaning. *Id.* at 1343. In *Ritter*, the plaintiffs argued that the Alabama Secretary of State violated section 5 of the Voting Rights Act by "implementing a definition of [a] candidate distinct from the one prescribed by [the precleared statute.]" *Id.* at 1341. In finding no change, the district court reasoned that "courts accord significant weight to the interpretation of a statute by the agency that is charged with the responsibility of implementing it. The same presumption of validity that attaches to the agency action applies to a state agency as to a federal agency." *Id.* at 1343 (citations omitted). The court explained that because "the Secretary of State's interpretation of the statute appears reasonable," "the court will defer to [it]." *Id.*

Under Alabama law, final authority for interpreting state statutes lies with the Alabama Supreme Court. *Ex parte James*, 863 So. 2d at 834. Under *Ritter*, this Court should defer to the Alabama Supreme Court's interpretation of Act No. 2004-455, so long as that interpretation is reasonable. The holding in *Riley v. Kennedy* clearly satisfies this standard. The decision is supported by the plain

language of Act No. 2004-455 and decades of Alabama precedent requiring that statutes be construed as purely prospective. *See* J.S. App. 29a-309. Accordingly, this Court should hold that the interpretation in *Riley v. Kennedy*, like the interpretation in *Ritter*, is not a change requiring preclearance under section 5.

III. The Court Need Not Decide Whether The Alabama Supreme Court's 1988 Decision In *Stokes v. Noonan* Required Preclearance.

If this Court concludes that Alabama may implement the holding in *Riley v. Kennedy* without obtaining preclearance, it need go no further.

The Appellees have requested only prospective relief—vacatur of Juan Chastang's appointment, an injunction against enforcement of *Riley v. Kennedy*, and an injunction against enforcement of *Stokes v. Noonan*. A ruling that Alabama may implement *Riley v. Kennedy* will be sufficient to uphold Juan Chastang's appointment to the Mobile County Commission, which was made pursuant to Act No. 2004-455 and the order in *Riley v. Kennedy*. It will also dispose of Appellees' second request for relief.

Appellees' third request for relief would no longer be an issue in this case. There is no likelihood that Alabama will seek to enforce *Stokes v. Noonan*. No other seats on the Mobile County Commission are in dispute, and it is undisputed that future vacancies will be filled pursuant to Act No. 2006-342 and Act No. 2004-455, not the decision in *Stokes v. Noonan*. Even if Appellees were to prevail on their claims

regarding *Stokes v. Noonan*, they would not be entitled to any relief. Accordingly, the Court need not address the question. *See City of Dallas v. United States*, 482 F. Supp. 183 (D.D.C. 1979) (holding that declaratory judgment action brought by city seeking approval of voting plan was moot in light of city's subsequent approval of new plan and preclearance by Attorney General); *cf. Texas v. United States*, 523 U.S. 296 (1998) (holding that Texas's request for preclearance of legislatively authorized sanctions was not ripe, because it was questionable that the sanctions would ever be triggered or imposed).

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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January 22, 2008

JOINT APPENDIX

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No. 07-77

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JAN 14 2008
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SUPREME COURT, U.S.

In the
Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

YVONNE KENNEDY, JAMES BUSKEY and WILLIAM CLARK,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

JOINT APPENDIX

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Appendix to the Jurisdictional Statement at the cited pages:

Document	J.S. App. Page
Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c, as amended	14a
Stokes v. Noonan, 534 So. 2d 237 (Ala. 1988)	17a
Riley v. Kennedy, 928 So. 2d 1013 (Ala. 2005)	25a
Kennedy v. Riley, 445 F. Supp. 2d 1333 (M.D. Ala. 2006) (order declaring decisions of the Alabama Supreme Court subject to preclearance)	3a
Kennedy v. Riley, ___ F. Supp. 2d ___, 2007 WL 1284912 (M.D. Ala. May 1, 2007), (order vacating appointment of Juan Chastang)	1a
Governor Riley's Notice of Appeal	11a

* * *

The following documents may be found in the Appendix to the Motion to Dismiss or Affirm at the cited pages:

Document	M.D.A. App. Page
Act No. 2006-342	1a

Department of Justice Letter Refusing Preclearance of *Stokes v. Noonan* and *Riley v. Kennedy* 2a

Department of Justice Letter Refusing Reconsideration 9a

Relevant Docket Entries in the United States District Court for the Middle District of Alabama

11/16/2005	1	COMPLAINT against Bob Riley (Filing fee $ 250.00 receipt number 108453.), filed by William Clark, Yvonne Kennedy, James Buskey. (Three-Judge Court Requested) (Preliminary Injunction Requested) (Attachments: # 1 Attachment 1) (sl,) (Entered: 11/16/2005)
11/21/2005	3	ANSWER to Complaint by Bob Riley.(Park, John) (Entered: 11/21/2005)
11/21/2005	4	ORDER of Designation of Three-Judge Court designating Judge Stanley Marcus and Judge W. Harold Albritton III to serve with Judge Myron H. Thompson as members of the Court to hear and determine this action as further set out in order. Signed by Judge J. L. Edmonson on 11/21/05. (sl,) (Entered: 11/22/2005)
01/13/2006	14	STIPULATION *JOINT STIPULATION OF FACT* by Yvonne Kennedy. (Attachments: # 1 # 2 # 3 # 4 # 5 # 6 # 7 # 8 # 9 # 10 # 11 # 12 # 13 # 14) (Gardner, Jesse) (Entered: 01/13/2006)
01/20/2006	15	TRIAL BRIEF by William Clark,

		Yvonne Kennedy, James Buskey. (Still, Edward) (Entered: 01/20/2006)
02/03/2006	16	TRIAL BRIEF by Bob Riley. (Park, John) (Entered: 02/03/2006)
02/10/2006	17	REPLY BRIEF re 16 Trial Brief filed by William Clark, Yvonne Kennedy, James Buskey. (Still, Edward) (Entered: 02/10/2006)
03/29/2006	18	Minute Entry for ORAL ARGUMENT before THREE-JUDGE COURT--Circuit Judge Stanley Marcus and District Judges Myron Thompson and W. Harold Albritton--held on 3/29/2006. (Court Reporter Mitchell Reisner.) (snc) (Entered: 03/29/2006)
03/29/2006		ORAL ORDER directing parties to submit a stipulation with additional factual data, as outlined by the Court, within 10 (working) days, and directing parties to file supplemental briefs, maximum 15 pages, addressing the legal issues outlined by the Court; plaintiffs' brief is due 7 (working) days after stipulation is filed and defendant's brief is due 7 (working) days after plaintiffs' brief. Entered by Circuit Judge Stanley Marcus and District Judges Myron H. Thompson and

		W. Harold Albritton on 3/29/06. (snc) (Entered: 03/30/2006)
04/12/2006	19	STIPULATION re 14 Stipulation *supplemental* by William Clark, Bob Riley, Yvonne Kennedy, James Buskey (pursuant to ORAL ORDER entered on 3/29/06). (Still, Edward) (Entered: 04/12/2006)
04/14/2006	20	TRIAL BRIEF *supplemental* by William Clark, Yvonne Kennedy, James Buskey. (Still, Edward) (Entered: 04/14/2006)
04/25/2006	21	TRIAL BRIEF *Supplemental* by Bob Riley. (Park, John) (Entered: 04/25/2006)
08/18/2006	22	OPINION; An appropriate judgment will be entered. Signed by United States Circuit Judge Stanley Marcus, United States District Judge Myron H. Thompson, Senior United States District Judge W. Harold Albritton on 8/18/06. (sl,) (Entered: 08/18/2006)
08/18/2006	23	JUDGMENT as follows: (1) Judgment is entered in favor of plaintiffs Yvonne Kennedy, James Buskey, and William Clark and against defendant Bob Riley; (2) the State of Alabama has 90 days from the date of this order to obtain preclearance in accordance with Sec. 5 of the Voting Rights Act

of 1965, as amended, 42 U.S.C. 1973c; if the State fails to comply with this requirement within the time allowed, the court will revisit the issue of remedy. Defendant Riley is to keep the court informed of what action, if any, the State decides to take and the result of that action. It is further Ordered that costs are taxed against defendant Riley, for which execution may issue. The clerk of court is directed to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the FRCP. Signed by United States Circuit Judge Stanley Marcus, United States District Judge Myron H. Thompson, Senior United States District Judge W. Harold Albritton on 8/18/06. (Attachments: # 1 Civil Appeals Checklist)(sl,) (Entered: 08/18/2006)

11/09/2006	30	NOTICE by Bob Riley *of Filing Preclearance Submission* (Attachments: # 1 Exhibit A) (Park, John) (Entered: 11/09/2006)
11/15/2006	31	MOTION for Extension of Time to File Response/Reply by Bob Riley. (Park, John) (Entered: 11/15/2006)
11/16/2006	32	ORDER granting 31 Motion for Extension of Time for compliance; directing that the State of Alabama

		is allowed until 1/17/2007 to obtain preclearance, as further set out in order. Signed by Judge Myron H. Thompson on 11/16/06. (wcl,) (Entered: 11/16/2006)
12/01/2006	33	STATUS REPORT by Bob Riley. (Attachments: # 1 Exhibit A) (Park, John) (Entered: 12/01/2006)
01/10/2007	35	MOTION Special Election by William Clark, Yvonne Kennedy, James Buskey. (Attachments: # 1 Exhibit Ex A -- DOJ letter) (Still, Edward) (Entered: 01/10/2007)
01/10/2007	36	RESPONSE in Opposition re 35 MOTION Special Election *(Response in Opposition to Plaintiffs' Motion for Further Relief)* filed by Bob Riley. (Park, John) (Entered: 01/10/2007)
01/11/2007	37	ORDERED as follows: (1) The State of Alabama is allowed additional time to seek timely reconsideration of the decision of the United States Department of Justice, dated 1/8/07; (2) defendant is to report on the status of the reconsideration request on the first business day of each month, beginning February 2007; (3) plaintiffs' 35 MOTION for further relief is denied without prejudice. Signed by Judge Stanley Marcus, Judge

		Myron H. Thompson and Judge W. Harold Albritton on 1/11/07. (sl,) (Entered: 01/11/2007)
01/30/2007	42	STATUS REPORT by Bob Riley. (Attachments: # 1 Exhibit A) (Park, John) (Entered: 01/30/2007)
03/13/2007	44	Second MOTION New election by William Clark, Yvonne Kennedy, James Buskey. (Attachments: # 1 Exhibit A -- letter declining reconsideration) (Still, Edward) (Entered: 03/13/2007)
03/21/2007	46	RESPONSE to Motion re 44 Second MOTION New election filed by Bob Riley. (Park, John) (Entered: 03/21/2007)
03/23/2007	47	Response to Order re 46 Response to Motion *(opp to mot to reconsider)* by William Clark, Yvonne Kennedy, James Buskey. (Still, Edward) (Entered: 03/23/2007)
05/01/2007	48	ORDER, JUDGMENT, and DECREE of the court that the plaintiffs' 44 Renewed MOTION for further relief is granted to the extent that the appointment of Juan Chastang to the Mobile County Commission is vacated. Signed by Circuit Judge Stanley Marcus, District Judge Myron H. Thompson, and District Judge W. Harold Albritton on 5/1/07. (sl,)

(Entered: 05/01/2007)

05/02/2007	49	Emergency MOTION to Stay re 48 Order, Terminate Motions, by Bob Riley. (Park, John) (Entered: 05/02/2007)
05/03/2007	50	RESPONSE to Motion re 49 Emergency MOTION to Stay re 48 Order, Terminate Motions, *PLAINTIFFS' RESPONSE TO EMERGENCY MOTION TO STAY* filed by Yvonne Kennedy. (Attachments: # 1 Exhibit) (Gardner, Jesse) (Entered: 05/03/2007)
05/17/2007	52	OPINION AND ORDER that defendant Bob Riley's 49 MOTION for a stay is DENIED. Signed by Judge Stanley Marcus, Judge Myron H. Thompson, and Judge W. Harold Albritton on 5/17/07. (sl,) (Entered: 05/17/2007)
05/18/2007	54	NOTICE OF APPEAL as to 23 Judgment, 48 Order, Terminate Motions, 22 Memorandum Opinion and Order by Bob Riley (Park, John) (Entered: 05/18/2007)
07/26/2007	82	Appeal Remark: Letter received from Supreme Court of the United States re 07-77, 54 Notice of Appeal with following notation: an appeal in the above-entitled case was filed in this Court July 17, 2007 and placed on the docket July 23, 2007,

as No. 07-77. (ydw,) (Entered: 08/01/2007)

Case 2:05-cv-01100-MHT-DRB Document 1-1
Filed 11/16/2005 Page 1 of 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
v.	)	**NUMBER: 2:05cv1100-T**
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

COMPLAINT
THREE-JUDGE COURT REQUESTED
PRELIMINARY INJUNCTION REQUESTED

1. This is an action to enjoin violations of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

PARTIES

2. Yvonne Kennedy, James Buskey & William Clark are each registered voters in Mobile County, Alabama, and residents of County Commission District 1.

3. Honorable Bob Riley is the Governor of the State of Alabama and is the official charged with the responsibility of making appointments to fill vacancies on county commissions in Alabama in some circumstances according to Code of Alabama, § 11-3-6.

FACTS

4. On October 3, 2005, Honorable Sam Jones, the individual formerly holding the office of County Commissioner of District 1 of the Mobile County Commission, vacated that office and assumed the office of Mayor of the City of Mobile.

5. Defendant Riley, after the decision of the Supreme Court of Alabama in Riley v. Kennedy, decided November 9, 2005 (copy attached), has the authority to make an appointment to fill the vacancy above mentioned. The plaintiffs are informed and believe that Governor Riley has appointed Juan Chastang to the position of Mobile County Commissioner.

6. On information and belief, the plaintiffs aver that no official of Mobile County or of the State of Alabama has submitted the change effected by the decision in Riley v. Kennedy to either the Attorney General of the United States or the U.S. District Court for the District of Columbia for preclearance under the Section 5 of the Voting Rights Act.

CLAIM ONE

7. The defendant has violated the Voting Rights Act by administering a practice which is different from that in effect on 8 November 2005 without preclearance.

8. The plaintiffs are without an adequate remedy at law and will suffer irreparable damage unless the actions of the defendant in violation of the Voting Rights Act are enjoined.

PRAYER FOR RELIEF

9. The Plaintiffs pray that the Court will enter a declaratory judgment that the defendant lacks the power to appoint a person to fill a vacancy on the Mobile County Commission unless and until the defendant obtains preclearance, as required by Section 5 of the Voting Rights Act.

10. The plaintiffs pray that the Court will grant a preliminary and permanent injunction to enjoin the defendant to not deliver the commission or other appointment papers to any person for the Mobile County Commission District 1 vacancy unless and until the defendant obtains preclearance, as required by Section 5 of the Voting Rights Act.

11. The plaintiffs pray that the Court will grant a preliminary and permanent injunction to enjoin the defendant and all persons acting in concert with him to refrain from any acts to appoint or swear in any person as a Mobile County Commissioner or for any person acting in concert with the defendant to accept or serve as an appointed Mobile County Commissioner unless and until the defendant obtains preclearance, as required by Section 5 of the Voting Rights Act.

12. The plaintiffs pray that the Court will convene a special district court of three judges to hear this matter.

13. The plaintiffs pray that the Court will enter such other relief as the premises may require.

14. The plaintiffs pray that the court will order the defendant to pay the plaintiffs' costs and reasonable attorneys' fees.

Signed on this 16th day of November, 2005.

/s/ J. Cecil Gardner
J. Cecil Gardner
M. Vance McCrary
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CERTIFICATE OF NOTICE

I certify that I notified each of the following of the time and place we intended to file this complaint, provided him with a copy of the complaint by fax or email, and informed him that we would request a preliminary injunction as quickly thereafter as possible:

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Governor, State of Alabama
c/o Hon. Troy King
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/s/ J. Cecil Gardner
J. CECIL GARDNER

Case 2:05-cv-01100-MHT-DRB Document 3
Filed 11/21/2005 Page 1 of 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
v.	)	**NUMBER:**
	)	**2:05cv1100-T**
HONORABLE BOB RILEY, as Governor of the State of Alabama,	)	
Defendant.	)	

ANSWER

The Honorable Bob Riley, in his official capacity as Governor of Alabama, defendant in this action, answers the Complaint as follows:

SPECIFIC RESPONSES

1. Paragraph 1 is a summary of this action as to which no response is required. To the extent a response is required, Governor Riley denies that the Kennedy Plaintiffs are entitled to the relief requested.

2. Governor Riley admits the allegations of paragraph 2.

3. With respect to the allegations of paragraph 3, Governor Riley admits that he is Governor of Alabama and that, pursuant to Code of Alabama § 11-3-6 (Supp. 2004), he is empowered to fill vacancies on county commissions in Alabama "[u]nless a local law authorizes a special election . . . ." Governor Riley denies the remaining allegations of paragraph 3. Governor Riley states further that the governor's power to fill vacancies on county commissions was in effect before November 1, 1964.

4. Governor Riley admits the allegations of paragraph 4.

5. With respect to the allegations of paragraph 5, Governor Riley admits that, in *Riley v. Kennedy*, No. 1050087, __ So. 2d __ (Ala. Nov. 9, 2005), the Supreme Court of Alabama held that, as a matter of state law statutory interpretation, the vacancy on the Mobile County Commission was to be filled by Governor's appointment and that he has appointed Juan Chastang to fill the vacancy. Governor Riley denies the remaining allegations of paragraph 5.

6. For his response to paragraph 6, Governor Riley denies that there has been a change within the meaning of the Voting Rights Act and denies the allegations of paragraph 6 on that basis.

7. Governor Riley denies the allegations of paragraph 7.

8. Governor Riley denies that the Kennedy Plaintiffs are entitled to relief.

9-14. Governor Riley denies that the Kennedy Plaintiffs are entitled to the relief requested in paragraphs 9 through 14.

GENERAL DEFENSES

FIRST DEFENSE

Governor Riley's appointment of Juan Chastang to fill a vacancy on the Mobile County Commission is not a change affecting voting that requires preclearance.

SECOND DEFENSE

Governor Riley's power of appointment stems from a state law that was in effect before November 1, 1964, and that, as subsequently modified and precleared, preserves that power "[u]nless a local law authorizes a special election . . . ." No valid state law authorizes a special election to fill a vacancy on the Mobile County Commission.

THIRD DEFENSE

The United States cannot tell a State what state law is without running afoul of the Tenth Amendment to the United States Constitution.

FOURTH DEFENSE

The Alabama Supreme Court's decision in *Riley v. Kennedy* does not effect a change in a standard, practice, or procedure with respect to voting.

FIFTH DEFENSE

The Kennedy Plaintiffs had a full and fair opportunity to litigate their claims in state court and are bound by the Alabama Supreme Court's interpretation of state law in *Riley v. Kennedy.*

SIXTH DEFENSE

Governor Riley contests the Plaintiffs' entitlement to attorneys' fees and the amount thereof.

Respectfully submitted,

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ATTORNEY GENERAL
BY:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of November, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following (or by U.S. Mail to the non CM/ECF participants):

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s/ John J. Park, Jr.
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Case 2:05-cv-01100-MHT-DRB Document 14
Filed 01/13/2006 Page 1 of 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

YVONNE KENNEDY, JAMES BUSKEY & WILLIAM CLARK,	*	
Plaintiffs,	*	
vs.	*	**CIVIL ACTION**
HONORABLE BOB RILEY, As Governor of the State of Alabama,	*	**NO. 2:05 CV 1100-T**
Defendant.	*	

JOINT STIPULATION OF FACT

1. Act 85-237 was a local act providing for the election of county commissioners to fill vacancies on the Mobile County Commission. Exhibit A.

2. The Alabama Attorney General submitted Act 85-237 for preclearance on April 15, 1985. Exhibit B.

3. The Attorney General of the U.S. issued a "no objection" letter regarding Act 85-237 on June 17, 1985. Exhibit C.

4. The Alabama Supreme Court decided Stokes v. Noonan, 534 So.2d 237, on September 30, 1988, and held that the subject of Act 85-237 was subsumed by general law (Ala. Code § 11-3-6) and therefore invalid under Ala. Const. Art. IV § 105. Exhibit D.

5. Act 2004-455 amended Ala. Code § 11-3-6 to allow local laws to provide an exception to the general rule of appointments by the Governor to file vacancies. Exhibit E.

6. The Alabama Attorney General submitted Act 2004-455 for preclearance on August 9, 2004. Exhibit F.

7. The Attorney General of the U.S. issued a "no objection" letter regarding Act 2004-455 on September 28, 2004. Exhibit G.

8. In September 2005, the Honorable Sam Jones, then the County Commissioner of District 1 of Mobile County, was elected Mayor of Mobile. Because Jones would have to resign from his position as County Commissioner to become Mayor, a vacancy on the county commission would be created.

9. In anticipation of that vacancy, on September 19, 2005, Yvonne Kennedy, James Buskey, and William Clark, the plaintiffs in this action, filed suit in the Circuit Court of Montgomery County, Alabama, seeking, among other things, a declaration that the vacancy was to be filled by special election.

10. On September 29, 2005, the Circuit Court of Montgomery County (Reese, J.) issued an Order declaring that the vacancy was to be filled by special election. Exhibit H.

11. On October 3, 2005, Honorable Sam Jones, the individual formerly holding the office of County Commissioner of District 1 of the Mobile County Commission, vacated that office and assumed the office of Mayor of the City of Mobile.

12. Governor Riley filed a timely notice of appeal from the Circuit Court of Montgomery County to the Supreme Court of Alabama.

13. By letter dated October 13, 2005, Probate Judge Don Davis submitted a special election procedure (to wit, the calling of the special election for the District 1 Commissioner) for preclearance. Exhibit I.

14. By letter dated October 25, 2005, the Office of the Attorney General of Alabama recommended that the Attorney General of the United States withhold action on the submission pending the outcome of the appeal in *Kennedy v. Davis*, Case No. CV-2005-2432, in the Circuit Court of Montgomery County. Exhibit J.

15. By letter dated October 26, 2005, the Attorney General of the United States interposed no objection to the proposed procedures for conducting the elections needed to fill the vacancy on the Mobile County Commission.

16. Pursuant to an expedited schedule Governor Riley and the Kennedy Appellees filed their Briefs in the Supreme Court of Alabama contemporaneously on November 3, 2006. Exhibits K and L.

17. On November 9, 2005, the Alabama Supreme Court decided Riley, et al. v. Kennedy, et al, Case Number 1050087 and held that Act 2004-455, the amendment

to Ala. Code § 11-3-6 to provide for special elections where provided for by local law, did not revive Act 85-237 to allow a special election to fill the vacancy created when Honorable Sam Jones assumed the office of Mayor of the City of Mobile. Exhibit M.

18. By letter dated November 10, 2005, the Office of the Attorney General of Alabama advised the Chief, Voting Section, Civil Rights Division, United States Department of Justice, of the Alabama Supreme court's ruling in *Kennedy* v. *Riley*. Exhibit N.

19. Between April 15, 1985 and today, except as noted above, neither the Alabama Attorney General nor any representative of Mobile County or its officials has submitted for preclearance any substantive change regarding the appointment or election of Mobile County commissioners to fill vacancies.

20. The parties disagree whether there has been a "change" within the meaning of the Voting Rights Act.

21. Governor Riley appointed Juan Chastang to the position of Mobile County Commissioner, District 1, on November 15, 2005.

22. According to the 2000 Census, the total population of Alabama was 4,447,100, of whom 26.3% were black.

23. The total registered voters (according to January 3, 2006 report of the Mobile County Board of Registrars) of Commission District 1, Mobile County, was 75,087 of whom 62% were black.

24. The total registered voters (according to the January 3, 2006 report of the Mobile County Board of Registrars) of Commission District 2, Mobile County was 78,857 of whom 18% were black.

25. The total registered voters (according to the January 3, 2006 report of the Mobile County Board of Registrars) of Commission District 3, Mobile County was 79,922 of whom 15% were black.

26. There are approximately three hundred fifty two (352) county commissioners in the 67 county commissions of Alabama.

27. Of the approximately three hundred fifty two (352) county commissioners of Alabama, approximately seventy eight (78) are black.

28. The parties agree that each of the Exhibits attached to these Stipulations are true and correct copies of the original documents.

Submitted, by,

/s/ M. Vance McCrary
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CERTIFICATE OF SERVICE

I certify that on January 13, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys listed above.

/s/ Vance McCrary

Case 2:05-cv-01100-MHT-DRB Document 19
Filed 04/12/2006 Page 1 of 3

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

YVONNE KENNEDY, JAMES BUSKEY, AND WILLIAM CLARK, Plaintiffs, v. HONORABLE BOB RILEY, as Governor of the State of Alabama, Defendant.	CIVIL ACTION NO. 2:05cv01100-MHT-DRB

SUPPLEMENTAL STIPULATION

Pursuant to directives of the court, the parties stipulate as follows:

1. Prior to June 16, 1987, a vacancy occurred in the Office of Commissioner, District 1, Mobile County Commission. The term of the office remaining was set to, and did expire on January 15, 1989, more than one (1) year from the date the vacancy occurred.

2. In April 1987, Willie H. Stokes filed suit in Mobile County Circuit Court contesting the constitutionality of Act No. 85-237 under which a special election to file a va-

cancy on the Mobile County Commission would be conducted.

3. On June 16, 1987, Mobile County conducted a Democratic Primary Election which was won by Sam Jones who defeated one (1) other candidate.

4. On June 30, 1987, Mobile County conducted a special general election to fill the District 1 vacancy and Sam Jones was successful over three (3) other candidates.

5. On July 3, 1987, Mobile County Probate Judge, L. W. Noonan, certified that Sam Jones was duly elected to the office of County Commission, District 1. Jones assumed the office at that time.

6. In the *Stokes v. Noonan* case, the Circuit Court ruled that the Local Act was constitutional, but on September 30, 1988, the Supreme Court of Alabama reversed that decision in *Stokes v. Noonan*, 534 So.2d 237 (Ala 1988).

7. On October 11, 1988, Governor Guy Hunt appointed Sam Jones to the office of Commissioner, District 1, Mobile County Commission.

8. Sam Jones served continuously from July 3, 1987 through January 15, 1989 to complete the partial term. He was elected in 1988, 1992, 1996, 2000, and 2004 to successive terms and served until his resignation on October 3, 2005.

Submitted by,

/s/ J. Cecil Gardner*
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*signed by Edward Still with express consent

CERTIFICATE OF SERVICE

I certify that on 12 April 2006 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys listed above.

/s/ Edward Still

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

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November 9, 2006

Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

RE: Submission under Section 5 of the Voting Rights Act of 1965
Expedited Consideration Requested

Dear Sir:

In accordance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, we make this submission for preclearance by the Attorney General of the United States. This submission concerns two decisions of the Supreme Court of Alabama that concern the method of filling vacancies on the Mobile County Commission. Those decisions are Riley v. Kennedy, 928 So. 2d 1013

(Ala. 2005), and Stokes v. Noonan, 534 So. 2d 237 (Ala 1988).

We request expedited consideration of this submission, which is made pursuant to the order of a three judge federal district court. See Kennedy v. Riley, 445 F. Supp. 2d 1333 (M.D.Ala. 2006) (three-judge court). In its judgment, the court allowed the State 90 days to obtain preclearance. That 90-day period expires on or about November 16, 2006, and the State contemplates asking the court for an extension if no action has been taken by that date. In the time between the entry of the judgment and this submission, the State considered whether to appeal from the judgment and responded to the Kennedy plaintiffs' request for attorneys' fees. In addition, the undersigned, who had handled this case in both state and federal court, moved to Northern Virginia, wrote two appellees' briefs, an appellant's initial brief and reply brief, and consulted with the office in Montgomery on other issues.

As noted above, this submission relates to the method of filling vacancies on the Mobile County Commission. Before the effective date of the Voting Rights Act in Alabama, November 1, 1964, general law provided that vacancies on county commissions, including the Mobile County Commission, would be filled through gubernatorial appointment. That general law was codified at § 11-3-6, Code of Alabama (1989). In 1985, the Legislature passed a local law, Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by a special election. By letter dated June 17, 1985, the State was advised that the Attorney General of the United States had no objection to the proposed change.

In 1987, a vacancy in one of the seats on the Mobile County Commission occurred. In April of that year, Willie Stokes filed suit in the Circuit Court of Mobile County attacking the constitutionality of Act No. 85-237. The Circuit Court denied relief, and the vacancy was filled by special election. Stokes appealed, though, and, in a decision issued on September 30, 1988, the Supreme Court of Alabama reversed the judgment of the Circuit Court. In Stokes v. Noonan, the court declared Act No. 85-237 unconstitutional because it violated § 105 of the Constitution of Alabama (1901). Section 105 prohibits the enactment of a local law "in any case which is provided by a general law."

The Alabama Supreme Court's ruling created a vexing issue of state law. Without a valid election, the incumbent had no right to hold the office and was vulnerable to an action in quo warranto. Then-Governor Guy Hunt solved the problem by exercising his power of appointment to appoint the person who had been elected.

In 2004, the Alabama Legislature amended the general law, § 11-3-6, passing Act No. 2004-455. As amended, the statute provided that vacancies on county commissions would be filled by gubernatorial appointment "[u]nless a local law authorizes a special election." Ala. Code § 11-3-6 (Supp. 2004). By letter dated September 28, 2004, the State was advised that the Attorney General had no objection to the proposed change.

No vacancy on the Mobile County Commission arose until September 2005, when Sam Jones, an incumbent commissioner, was elected Mayor of Mobile. With the vacancy, the method of filling it became a bone of contention. Some contended that the vacancy was to be filled through a special election, pointing to Act 85-237 and ar-

guing that it had been revived by Act No. 2004-455. Others contended that, with the declaration that Act No. 85-237 was unconstitutional in Stokes v. Noonan, the vacancy was to be filled by gubernatorial appointment pursuant to the general law.

Three plaintiffs, Yvonne Kennedy, James Buskey, and William Clark filed suit in the Circuit Court of Montgomery County seeking declaratory and injunctive relief. They sought a declaration that the vacancy was due to be filled through a special election and an injunction directing the probate judge to conduct one. Governor Riley, who was named as a defendant, responded by contending that, with the declaration that Act 85-237 was unconstitutional in Stokes v. Noonan, he was empowered to fill the vacancy by appointment. The Circuit Court ruled in favor of the plaintiffs, and Governor Riley appealed.

Even though the appeal was expedited, the local election officials had to move quickly and asked the Attorney General of the United States to preclear a special election calendar that included a primary election on November 22, 2005, a run-off election on December 13, 2005, and a general election on January 3, 2006. The local election officials needed the approval of the Attorney General of the United States in order to start the election machinery. By letter dated October 25, 2005, the Attorney General of Alabama suggested that the Attorney General of the United States withhold action on the submittal pending the outcome of the litigation in state court. The Attorney General of Alabama pointed out that the proceedings in the Supreme Court of Alabama had been expedited and that withholding action was consistent with 48 [*sic*] C.F.R. § 51.22 (2004). The Attorney

General of the United States declined to withhold action and interposed no objection to the proposed special election.

As the Attorney General of Alabama suggested might happen, the Supreme Court of Alabama reversed the judgment of the Circuit Court. Riley v. Kennedy, 928 So.2d 1013 (Ala. 2005). The court held that Act No. 2004-455 did not operate retroactively so as to revive Act No. 85-237. With that ruling, there was no state law basis for the proposed special election. Governor Riley proceeded to appoint Juan Chastang, an African-American, to fill the vacancy. The Attorney General of Alabama advised the Attorney General of the United States of the ruling in Riley v. Kennedy and stated that the vacancy would be filled by gubernatorial appointment.

The plaintiffs then filed suit in federal district court asserting that Stokes v Noonan and Riley v. Kennedy were changes in voting law that had to be precleared to be enforceable. Governor Riley contested the lawsuit. In his briefing, Governor Riley noted that requiring preclearance of decisions made in the course of the ordinary appellate process that invalidated precleared changes were not changes in voting. Rather, any state statute must be valid as a matter of state law, not just precleared, to be enforceable. Preclearance does not speak to validity under state law. Moreover, preclearance cannot speak to validity under state law without raising grave constitutional questions. The three-judge court agreed with the plaintiffs and directed the State to seek preclearance of these decisions.

Without waiving its objections, the State requests that the Attorney General preclear the decisions of the

Supreme Court of Alabama in Stokes v. Noonan and Riley v. Kennedy.

In compliance with 28 C.F.R. § 51.27, we submit the following information to the Attorney General:

"(a) A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting."

Without conceding that either decision represents a change that must be precleared, a copy of the Alabama Supreme Court's decision in Riley v. Kennedy is included as Exhibit A-1. A copy of the Alabama Supreme Court's decision in Stokes v. Noonan is included as Exhibit A-2.

"(b) A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed."

A copy of Act No. 85-237, which was declared unconstitutional in Stokes v. Noonan, is included as Exhibit B-1. A copy of Act No. 2004-455, which was held not to be retroactive in Riley v. Kennedy, is included as Exhibit B-2. A copy of § 11-3-6 is included as Exhibit B-3.

"(c) If the change affecting voting either is not readily apparent on the face of the documents provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting."

Without conceding that either decision represents a change requiring preclearance, the decisions and the context set forth above adequately identify the chain of events.

"(d) The name, title, address, and telephone number of the person making the submission."

Troy King, Attorney General, John J. Park, Jr., Special Assistant Attorney General, and Misty S. Fairbanks, Assistant Attorney General, State of Alabama, Alabama State House, 11 South Union Street, 3d Floor, Montgomery, Alabama 36130-0152, Jack can be reached at 334-242-7997, and Misty at 334-353-8674; both share the same facsimile, which is 334-353-8440; and e-mail jpark@ago.state.al.us and mfairbanks@ago.state.al.us.

"(e) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different."

The State of Alabama.

"(f) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located."

Not applicable.

"(g) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar)."

The Supreme Court of Alabama.

"(h) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change."

The Supreme Court of Alabama has appellate jurisdiction over cases originating in the Circuit Courts of Alabama. See § 12-2-7, Code of Alabama (2006). The court had jurisdiction over the cases that resulted in the decisions in Stokes v. Noonan and Riley v. Kennedy.

"(i) The date of adoption of the change affecting voting."

Without conceding that either decision represents a change, the Alabama Supreme Court issued its decision in Riley v. Kennedy on November 9, 2005, and the decision in Stokes v. Noonan on September 30, 1988. The decision in Riley v. Kennedy was given effect insofar as the election that was to fill the vacancy in question, which was scheduled, has not taken place, and Juan Chastang was appointed to fill the vacancy. The decision in Stokes v. Noonan may have been given effect. After Act No. 85-237 was precleared, and before the Alabama Supreme Court decided Stokes v. Noonan, there was a vacancy on the Mobile County Commission that was filled by special election. After the decision in Stokes v. Noonan came down, there was no state-law basis for the special election. Then-Governor Hunt resolved the vexing state-law question by appointing the person who had been elected in the special election and was serving to the position. The issue was vexing because, after Stokes v. Noonan, that commissioner had no state-law entitlement to serve and would have been vulnerable to an action in quo warranto.

"(j) The date on which the change is to take effect."

The State incorporates the response in subparagraph (i) by reference.

"(k) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made."

The State incorporates the response in subparagraph (i) by reference.

"(l) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change."

Without conceding that there has been a change, the scope is limited to Mobile County. More particularly, the change affects only the Mobile County Commission, not any other elected body or office in Mobile County.

"(m) A statement of the reasons for the change."

Without conceding that there has been a change, the change results from litigation in the state courts. Both decisions involve the application of generally-applicable, race-neutral principles of law.

In Stokes v. Noonan, the Supreme Court of Alabama held that Act No. 85-237 was unconstitutional because it violated § 105 of the Alabama Constitution in that it was a local law enacted in a case "provided by general law." The decision in Stokes was an application of the court's holding in Peddycoart v. City of Birmingham, 354 So. 2d 808 (Ala. 1978). There, the court held that the presence of a general law had primary effect such that "a local law cannot be passed upon the subject." 354 So. 2d at 813.

In Riley v. Kennedy, the Supreme Court of Alabama applied race-neutral generally applicable principles of statutory construction relating to retroactivity of legislation. As the court noted, under Alabama law, "statutes are to be prospective only, unless clearly indicated by the legislature." 928 So. 2d at 1016 (quoting Gotcher v. Teague, 583 So. 2d 267, 268 (Ala. 1991)). It concluded that the "plain language" of Act No. 2004-455 and the Act's preamble provide "for prospective application only." 928 So. 2d at 1017.

"(n) A statement of the anticipated effect of the change on members of racial or language minority groups."

Without conceding that there has been a change, the immediate effect is to fill the vacancy on the Mobile County Commission by gubernatorial appointment rather than by special election. The vacancy at issue is in a majority-black commission district, but the change affects all of the seats on the Mobile County Commission. That body has three seats, two of which are in majority-white districts. Furthermore, Juan Chastang, the person whom Governor Riley appointed to fill the vacancy, is an African-American. As a result, Governor Riley believes that politics, not race, is at issue in this submission; if he had appointed the "right" African-American, there would be no complaint.

"(o) A statement identifying any past or pending litigation concerning the change or related voting practices."

Plainly, this submission is the product of litigation. A three-judge federal district court rejected the State's contention that there was no change and directed the State to seek preclearance. Likewise, the decisions in Stokes v. Noonan and Riley v. Kennedy, which are the

subject of this submission, are the product of litigation. Those decisions speak for themselves and, indeed, are the only word on the subject that is relevant.

"(p) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made."

In the judgment of the State of Alabama, these decisions, which are based on generally-applicable, race-neutral principles of law, are not subject to preclearance. Before a state statute that affects voting can become effective, it must not only be precleared but must also be valid as a matter of state law. Preclearance cannot make a state law valid; it makes a valid state law enforceable.

The State of Alabama notes further that the three-judge court's order puts it in a difficult position. The State agrees that, when statutes make changes that affect voting, they must be precleared. Nothing, however, immunizes those statutes from challenge under state law, and the preclearance of a statute cannot pretermit the State's litigation process. This is particularly the case where race-neutral, generally applicable principles of law are applied. If either the State or the Attorney General of the United States act before litigation is filed or before it is final, there is a risk that the same work will have to be done twice. The second review should not proceed on the basis that any previous review, of something else in any event, was correct.

Section 11-3-6, the general law, does not require preclearance because it was enacted before November 1, 1964. Act No. 82-237 was precleared by letter dated June 17, 1985. Act No. 2004-455 was precleared by letter dated September 28, 2004.

"(q) For redistrictings and annexations: the items listed under § 51.28 (a)(1) and (b)(1); for annexations only: the items listed under § 51.28(c)(3)."

Not applicable.

"(r) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in § 51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in § 51.37."

The Kennedy Plaintiffs are African-American members of the Alabama House of Representatives. They can be contacted at:

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351 North Broad Street
Mobile, AL 36603
(251) 690-6418

James E. Buskey
2207 Barretts Lane
Mobile, AL 36617
(251) 457-7928 (h)
(251) 208-5480
(delegation)

William Clark
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Prichard, AL 36612
(251) 438-1533 (b)
(251) 208-5480
(delegation)

The Kennedy Plaintiffs were represented by Ed Still, 2112 11th Avenue South, Suite 201, Birmingham, AL 35205, (205) 320-2882, and Cecil Gardner and Vance McCrary of Gardner, Middlebrooks, Gibbons & Kittrell, Post Office Drawer 3103, Mobile, AL 36652, (215) 433-8100.

Juan Chastang, an African-American whom Governor Riley appointed, can be contacted at 1503 Chantague Street, Mobile, AL 36603, 251-574-1000 (o). Mr. Chastang's profile can be accessed through the website for the Mobile County Commission, www.mobilecounty.org.

For further information, please contact Jack Park or Misty Fairbanks. Please direct all correspondence, including the determination letter, to them.

Sincerely,

TROY KING
Attorney General
By:

/s/ Jack Park LG

John J. Park, Jr.
Assistant Attorney General

TK:JJP
Enclosures

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28 November 2006

via UPS Overnight

Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

Re: Comment on Section 5 submission
No. 2006-6792
State of Alabama, Mobile County Commission, procedures for filing vacancies

Dear Mr. Tanner:

The State of Alabama has requested preclearance of two Alabama Supreme Court decisions, *Stokes v. Noonan* and *Kennedy v. Riley*, each of which held that

the Governor of Alabama had the authority to fill a vacancy on the Mobile County Commission, rather than allowing the people to elect a commissioner in a special election.

On behalf of my clients, Rep. James Buskey, Rep. William Clark, and Rep. Yvonne Kennedy, I request that you object to the State of Alabama's implementation of these two decisions. The change from local elections to gubernatorial appointment will have a racially discriminatory impact. Section 5(b) of the Voting Rights Act (as recently amended) provides:

> (b) Any ... standard, practice, or procedure with respect to voting that ... will have the effect of diminishing the ability of any citizens of the United States on account of race or color ... to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

Implementation of the change proposed by the State will violate this provision of the Voting Rights Act for the following reasons:

- First, this change will deny the voters in Mobile County the ability to elect a replacement member of the Commission whenever there is a vacancy.

- Second, because the State is about 26% black but the three commission districts in Mobile County are 62%, 18%, and 15% black, respectively, the black voters in District 1 of Mo-

bile County will have a significantly lessened opportunity to elect a preferred candidate of their choice (as opposed to a candidate chosen by the Governor).

- Third, about 97% of the population of Alabama lives outside of District 1 of Mobile County, so the transfer of power of election from 75,000 voters to the Governor will have a significant effect.

- Fourth, the voters of Mobile County Commission District 1 have different political preferences than Gov. Riley. In the recent gubernatorial election, the voters of District 1 cast only 40% of the votes for Gov. Riley, while the other two Districts voted 73% for Riley.[1]

- Fifth, the (overwhelmingly white) voters of Etowah County's District 6 were allowed to elect a replacement commissioner, while the (overwhelmingly black) voters of Mobile County's District 1 were not.

As the Alabama Attorney General mentioned in his letter requesting preclearance, this matter has been the subject of litigation. Reps. Kennedy, Buskey, and Clark

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[1] See the attached table, "Gov vote by precinct1.xls," based on a table obtained from the Mobile County Probate Court. I have added the information about the districts and sorted the table.

sued in federal court to enjoin Gov. Riley's enforcement of the Alabama Supreme Court decision until it was precleared. The Court entered judgment in the plaintiffs' favor. In that suit, the parties stipulated to most of the evidence. On the CD accompanying this letter, I have placed the two stipulations, all of the exhibits attached to the first stipulation, a chart showing the principal dates and events relevant to the change ("Timeline Mobile Co.pdf"), and a table showing the vote for governor in each precinct ("Gov vote by precinct l.xls").

Recap of the facts:

Since 1985, the state law applicable to filling vacancies on the Mobile County Commission has swung between gubernatorial appointment and special election.

In 1985, the Alabama Legislature adopted Act 85-237, a local act providing for the election of county commissioners whenever vacancies occurred on the Mobile County Commission. See Exhibit A. The Alabama Attorney General submitted Act 85-237 for preclearance on 15 April 1985. Exhibit B. The U.S. Attorney General issued a "no objection" letter regarding Act 85-237 on 17 June 1985. Exhibit C. At this point, Alabama law authorized a special election, and that was the only way to fill a vacancy consistent with the Voting Rights Act.

In the Spring of 1987, a vacancy occurred in the District 1 Commissioner position on the Mobile County Commission. Act 85-237 required a special election if more than one year remained in the term. Since there was more than one year remaining in the term, the election officials of Mobile County called a special election. Supplemental Stipulation at ¶ 1.

Sam Jones and another candidate qualified for the Democratic nomination, and Jones was nominated by the Democratic Party in a special primary. Jones also won the special general election over opposition. Supplemental Stipulation at ¶¶ 3-4.

Shortly after the vacancy occurred, a Mobile County voter filed suit to have Act 85-237 declared unconstitutional. The Circuit Court ruled in favor of the constitutionality of the law. Supplemental Stipulation at ¶ 5. On appeal to the Alabama Supreme Court, the Court held that the subject matter of Act 85-237 was subsumed by general law (Ala. Code § 11-3-6) and was therefore invalid under Ala. Const. Art. IV § 105. *Stokes v. Noonan*, 534 So.2d 237 (Ala. 1988); Joint Stipulation Exhibit D.

Under *Hathorn v. Lovorn*, 457 U.S. 255 (1982), the State of Alabama or Mobile County should have submitted the *Stokes v. Noonan* decision for preclearance. Until such preclearance was obtained, neither Mobile County nor the State could legally enforce or administer the change made by *Stokes v. Noonan*. The State has stipulated that no such submission has occurred (prior to this one). Joint Stipulation at ¶ 19.

Gov. Guy Hunt gave Sam Jones a commission of appointment after the *Stokes* decision. Supplemental Stipulation at ¶ 7. Because the State never obtained preclearance for the *Stokes* decision before Gov. Hunt administered it by appointing Jones, Gov. Hunt's action was unnecessary and illegal because Jones's elected term on the Mobile County Commission had not been terminated.

In 2004, the Legislature adopted Act 2004-455 which amended Ala. Code § 11-3-6 to allow local laws providing

methods other than gubernatorial appointment for filling vacancies. Exhibit E. The Alabama Attorney General submitted Act 2004-455 for preclearance on 9 August 2004. Exhibit F. The Attorney General of the U.S. issued a "no objection" letter regarding Act 2004-455 on 28 September 2004. Exhibit G.

The submission of Act 2004-455 mentioned *Stokes v. Noonan*, but did not state explicitly whether the new Act would have any effect on the previously-precleared Act 85-237. Exhibit F.

When Mobile County Commissioner Sam Jones was elected Mayor of the City of Mobile and made plans to resign from his position on the Commission, Reps. Kennedy, Buskey, and Clark filed suit in Montgomery County Circuit Court for relief including a declaration that the vacancy should be filled by special election. The plaintiffs took the position that Act 2004-455 had revived Act 85-237. Eventually, the Alabama Supreme Court decided that Act 2004-455 had a prospective effect only; that is, only local acts passed after the effective date of Act 2004-455 could take advantage of the proviso enacted by that Act. *Riley v. Kennedy*, Exhibit M.

The benchmark against which to judge the *Riley v. Kennedy* decision is the situation "in force and effect" immediately before it was decided. *Abrams v. Johnson*, 521 U.S. 74, 97 (1997); Section 5 Guidelines, 28 C.F.R. § 51.54(b)(1). The benchmark situation was the special-election requirement of Act 85-237 which had been precleared and administered in 1985-87 and reaffirmed by Act 2004-455 (which in turn had been precleared in 2004 and administered in other counties in 2004).

In summary, each time the Legislature has acted to provide for special elections to fill vacancies, the Alabama Attorney General has submitted the act and obtained preclearance. In contrast, the Alabama Attorney General has now belatedly submitted the Alabama Supreme Court decisions for preclearance – only after being ordered to do so by the District Court.

Act 2004-455 has been enforced in other counties.

To see the nature of the "change" wrought by the *Riley v. Kennedy* decision, you need look no further than Houston and Etowah Counties. After the adoption and preclearance of Act 2004-455, each County experienced a vacancy on its county commission and held a special election pursuant to a pre-2004 local act.

A special election was held in Houston County in accordance with Act 2004-455. The Attorney General of Alabama wrote in an official opinion on 7 September 2004 to Rep. Steve Clouse, "Vacancies on the Houston County Commission occurring after May 14, 2004 [the date of adoption of Act 2004-455], should be filled by special election as provided by local Act 86-174." Ala. A.G. Op. 2004-215, reproduced on pp. 32-35 of Exhibit L. The special election date was submitted for preclearance (No. 2004-3698) on 23 August 2004.

A letter relating to the Etowah County election is Exhibit L, page 28 n.2 (letter of Legislative Reference Service). The Secretary of State's website (http://www.sos.state.al.us/election/2005/scheduled.cfm (last visited 22 November 2006) lists the date of the election as 26 April 2005. This demonstrates that Alabama was enforcing Act 2004-455 as if it applied to pre-2004 Acts. The Etowah County special election was in a ma-

jority-white district, District 6. (I have not found a preclearance request for this special election on your website.)

Precedent supports a denial of preclearance

In this case, the benchmark against which to judge the *Riley* decision is the situation "in force and effect" immediately before it was decided. *Abrams v. Johnson*, 521 U.S. 74, 97 (1997); Section 5 Guidelines, 28 C.F.R. § 51.54(b)(1). It does not matter if the Attorney General was mistaken, or if the Houston or Etowah County officials were mistaken. Section 5 applies to changes in the actual practices of the covered jurisdiction. The City of Canton, Miss., "mistakenly" held an election using districts in 1965 even though a general state law required at-large elections. The Supreme Court held that Canton had to preclear its use of at-large elections because it was changing from the actual practice of using district elections. *Perkins v. Matthews*, 301 F.Supp. 565, 566 (S.D. Miss. 1969), rev. 400 U.S. 379 (1971).

A similar situation was presented in *Horry County v. United States*, 449 F.Supp. 990 (D.D.C. 1978), where the Court held,

> An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved *reallocates governmental powers among elected officials voted upon by different constituencies.* Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements.

Horry County, 449 F.Supp. at 995 (emphasis added). The Court in *Hardy v. Wallace*, 603 F.Supp. 174, 178 (N.D. Ala. 1985), relied on *Horry County* and held that Alabama had to submit for preclearance a law that had transferred appointment of the Greene County Racing Commission from the local legislative delegation to the Governor. The *Hardy* Court noted that

> that the *transfer* of appointment authority to the governor, over 99.7% of whose constituents are not inhabitants of Greene County, substantially dilutes the power of the voters in Greene County by effectively eliminating the power of such voters over the Commission.

Hardy, 603 F.Supp. at 179.

The Solicitor General informed the Supreme Court of the following pre-1991 Section 5 objections to transfers of authority:

> (1) Mobile, Alabama, March 2, 1976, involving a transfer of administrative duties from the entire commission to individual commissioners; (2) Charleston, South Carolina, June 14, 1977, involving a transfer of taxing authority from the legislative delegation to the county council; (3) Edgefield County, South Carolina, February 8, 1979, involving a transfer of increased taxing power to the county council; (4) Colleton County, South Carolina, September 4, 1979, involving a transfer of authority to tax for school purposes from the legislative delegation to the county council; (5) Brunswick and Blynn County, Georgia, August 16, 1982, involving the abolition of separate city and county commissions and the

> transfer of their powers to a consolidated commission; (6) Hillsborough County, Florida, August 29, 1984, involving a transfer of power over municipalities from the legislative delegation to the county commission (objection was withdrawn because the county made clear that it did not intend to effect such a transfer); (7) Waycross, Georgia, February 16, 1988, involving a change in the duties of the mayor; and (8) San Patricio, Texas, May 7, 1990, involving a transfer of voter registration duties from the county clerk to the county tax assessor.

Presley v. Etowah County, 502 U.S. 491, 513 n.3 (1992) (Stevens, J., dissenting), citing Brief for United States as Amicus Curiae 16, n. 6.

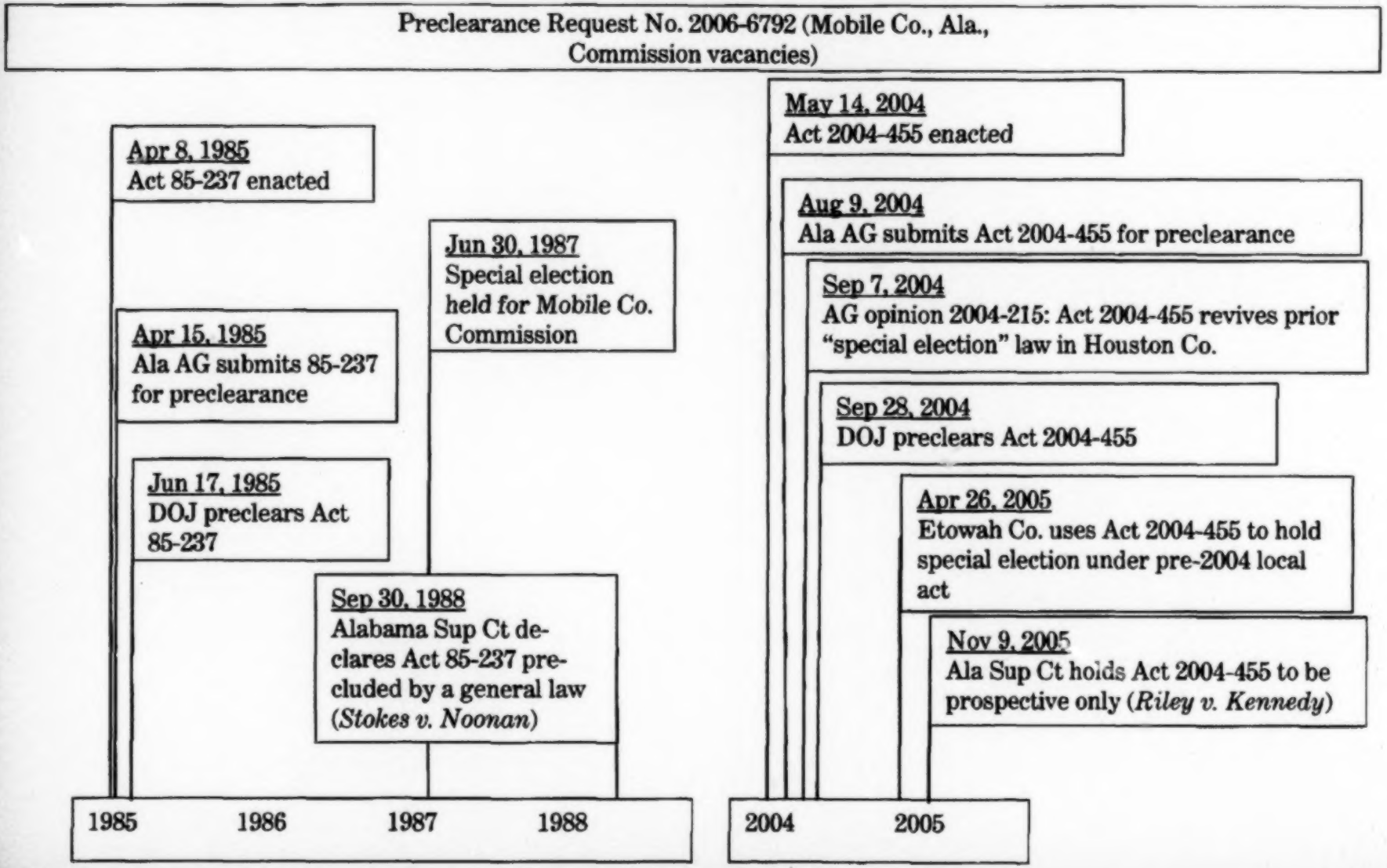
I will be happy to talk with you further regarding this matter. Please call or email me at your convenience.

Sincerely,

Edward Still

encl.

cc w/ encl:
Hon. James Buskey
Hon. William Clark
Cecil Gardner, Esq.
Sam Heldman, Esq.
Hon. Yvonne Kennedy
Vance McCrary, Esq.
John J. Park, Jr. Esq. (by email only)


Preclearance Request No. 2006-6792 (Mobile Co., Ala., Commission vacancies)
Apr 8, 1985
Act 85-237 enacted
Apr 15, 1985
Ala AG submits 85-237 for preclearance
Jun 17, 1985
DOJ preclears Act 85-237
Jun 30, 1987
Special election held for Mobile Co. Commission
Sep 30, 1988
Alabama Sup Ct declares Act 85-237 precluded by a general law (Stokes v. Noonan)
May 14, 2004
Act 2004-455 enacted
Aug 9, 2004
Ala AG submits Act 2004-455 for preclearance
Sep 7, 2004
AG opinion 2004-215: Act 2004-455 revives prior "special election" law in Houston Co.
Sep 28, 2004
DOJ preclears Act 2004-455
Apr 26, 2005
Etowah Co. uses Act 2004-455 to hold special election under pre-2004 local act
Nov 9, 2005
Ala Sup Ct holds Act 2004-455 to be prospective only (Riley v. Kennedy)
1985
1986
1987
1988
2004
2005

Precinct breakdown - All
FOR GOVERNOR

Mobile County Probate Court
Mobile County Alabama

Precinct No	Precinct	LUCY BAXLEY (DEM)	Vote Percent	BOB RILEY (REP)	Vote Percent	WRITE IN	Vote Percent	Co Comm. District
0	*Summary	34,198	37%	58,690	63%	307	0%	
1	HOWARD BLACKWELL LODGE	458	24%	1,441	76%	3	0%	1
2	FIRST BAPTIST CHURCH OF AXIS	292	37%	498	63%	3	0%	1
3	MT VERNON CIVIC CENTER	342	61%	213	38%	2	0%	1
4	OLD BELSAW SCHOOL/SHEPARD'S LAKE	217	88%	29	12%	0	0%	1
6	TURNERVILLE COMMUNITY CTR	257	24%	821	76%	4	0%	1
8	CHUNCHULA BAPTIST CHURCH	93	33%	188	67%	0	0%	1
9	KALI OKA CIVIC CLUB	142	18%	650	82%	2	0%	1
10	BAYOU SARA BAPTIST CHURCH	325	27%	851	72%	6	1%	1
11	SARALAND CIVIC CENTER	255	25%	769	75%	4	0%	1
12	CHICKASAW AUDITORIUM	420	31%	935	69%	6	0%	1
14	BISHOP STATE COMM COLLEGE	423	89%	50	11%	0	0%	1
16	SPRINGHILL AVE RECREATION CTR	333	50%	335	50%	4	1%	1
17	ST JOAN OF ARC CHURCH	545	58%	391	42%	0	0%	1
18	MOBILE CIVIC CENTER	414	73%	153	27%	1	0%	1
19	ROCK OF FAITH BAPTIST CHURCH	1,196	85%	215	15%	2	0%	1
23	WHISTLER UNITED METH. CH.	281	73%	103	27%	1	0%	1
24	MT. CAVLARY BAPTIST CHURCH	644	88%	87	12%	0	0%	1
25	OLD BLOUNT HIGH SCHOOL	863	87%	132	13%	0	0%	1
26	MT SINAI MISSIONARY BAPTIST	603	84%	119	16%	0	0%	1
27	EIGHT MILE SCHOOL	761	68%	351	32%	1	0%	1

30	COLLEGE PARK BAPTIST	318	43%	428	57%	1	0%	1
32	TRINITY LUTHERAN CHURCH	267	84%	52	16%	0	0%	1
33	PRICHARD CITY HALL	201	80%	48	19%	1	0%	1
35	LEFLORE HIGH SCHOOL	601	87%	89	13%	0	0%	1
36	ARIEL W HOLLOWAY SCHOOL	1,835	88%	243	12%	2	0%	1
37	BOYS CLUB OF MOBILE	515	85%	92	15%	1	0%	1
39	ELIZABETH S CHASTANG SCHOOL	339	83%	69	17%	0	0%	1
59	CITRONELLE NATL GUARD ARMORY	335	32%	721	68%	1	0%	1
68	WHITLEY SCHOOL	286	85%	50	15%	0	0%	1
69	PLATEAU COMMUNITY CTR	330	89%	42	11%	0	0%	1
70	ST FRANCIS XAVIER	512	87%	74	13%	2	0%	1
71	MOBILE CITY FEDERATION/WOMEN	315	88%	45	13%	0	0%	1
77	MAE EANES SCHOOL	987	84%	191	16%	3	0%	1
Total	District 1	15,705	60%	10,475	40%	50	0%	
7	HAVENWOOD BAPTIST CHURCH	71	21%	274	79%	0	0%	2
28	AZALEA CITY CH OF CHRIST	141	23%	457	76%	3	0%	2
29	INDIAN SPRINGS BAPTIST (ED BLDG)	121	30%	283	70%	0	0%	2
40	LITTLE WELCOME BAPTIST	541	52%	488	47%	6	1%	2
41	MOFFETT ROAD ASSEMBLY OF GOD	894	42%	1,234	58%	8	0%	2
42	HILLSDALE COMMUNITY CENTER	251	75%	82	25%	0	0%	2
44	MOBILE MUSEUM OF ART	160	14%	954	85%	7	1%	2
45	ST JOHN UNITED METHODIST	344	37%	578	63%	1	0%	2
46	UNIVERSITY CHURCH OF CHRIST	308	44%	385	55%	3	0%	2
47	HILLCREST BAPTIST CHURCH	722	23%	2,406	77%	14	0%	2
48	OUR SAVIOR CATHOLIC CHURCH	784	25%	2,312	74%	9	0%	2
51	ST IGNATIUS CHURCH (MARIAN CTR)	137	14%	872	86%	1	0%	2

52	E.R. DICKSON ELEMENTARY SCH	286	13%	1,961	87%	1	0%	2
53	FIRST ASSEMBLY OF GOD	346	31%	762	68%	8	1%	2
54	COMMUNITY OF CHRIST CHURCH	319	37%	548	63%	1	0%	2
55	KATE SHEPARD SCHOOL	252	20%	1,005	80%	4	0%	2
56	FIRST INDEPENDENT METH CHURCH	294	21%	1,091	78%	7	1%	2
57	WESTLAWN ELEMENTARY SCHOOL	468	40%	710	60%	4	0%	2
58	PLEASANT VALLEY METHODIST	268	31%	600	69%	3	0%	2
61	FELLOWSHIP BAPTIST CHURCH	68	25%	206	75%	0	0%	2
62	GEORGETOWN BAPTIST CHURCH	149	22%	514	77%	2	0%	2
63	FIRST BAPTIST CH/WILMER	162	20%	642	79%	7	1%	2
64	SEMMES COMMUNITY CTR	488	19%	2,136	81%	13	0%	2
66	TANNER WILLIAMS HIST SOC BLDG	84	16%	455	84%	2	0%	2
84	MOBILE CO LAW ENF AGENCY	59	18%	269	82%	0	0%	2
85	DODGE SCHOOL	513	23%	1,677	76%	9	0%	2
86	CRANFORD BURNS SCHOOL	614	30%	1,424	70%	4	0%	2
Total	District 2	8,844	27%	24,325	73%	117	0%	
13	MARY ABBIE BERG SR CENTER	325	29%	789	70%	6	1%	3
15	MURPHY HIGH SCHOOL LIBRARY	132	26%	382	74%	2	0%	3
20	ELKS LODGE #108	523	62%	319	38%	1	0%	3
21	PALMER PILLANS MIDDLE SCHOOL	202	36%	363	64%	2	0%	3
43	FRIENDSHIP BAPTIST CHURCH	118	77%	35	23%	0	0%	3
49	CREEKWOOD CHURCH OF CHRIST	692	19%	2,901	81%	10	0%	3
50	AUGUSTA EVANS SCHOOL	220	28%	573	72%	3	0%	3
65	JON ARCHER AGRICULTURAL CTR	259	18%	1,159	82%	3	0%	3

67	ABBA TEMPLE SHRINE AUDITORIUM	893	21%	3,386	79%	13	0%	3
73	WEST SIDE UNITED METH	128	30%	290	69%	2	0%	3
76	MORNINGSIDE SCHOOL	741	60%	496	40%	3	0%	3
78	TILLMAN'S CORNER COMMUNITY CTR	382	18%	1,682	81%	6	0%	3
79	HOLLINGERS ISLAND SCHOOL	128	18%	563	81%	6	1%	3
80	ST PHILLIP NERI CHURCH	212	23%	717	77%	8	1%	3
81	RIVERSIDE CHURCH OF THE NAZARENE	128	32%	275	68%	1	0%	3
82	ST ANDREWS EPISCOPAL CHURCH	297	37%	507	63%	2	0%	3
83	NAVCO BAPTIST CHURCH	37	16%	189	84%	0	0%	3
87	TRAVIS ROAD BAPTIST CHURCH	197	17%	956	82%	10	1%	3
88	FIRST BAPTIST CHURCH OF THEODORE	568	38%	927	62%	4	0%	3
89	ST MICHAEL CATHOLIC CHURCH	133	22%	469	78%	0	0%	3
90	CHARLES HAYNES LODGE NO. 627	100	32%	217	68%	0	0%	3
91	IRVINGTON FIRST BAPTIST	306	26%	836	72%	13	1%	3
92	MEADOWLAKE ELEMENTARY SCHOOL	287	23%	977	77%	4	0%	3
93	UNION BAPTIST CHURCH	165	21%	626	78%	8	1%	3
94	GRAND BAY MIDDLE SCHOOL	391	24%	1,205	75%	7	0%	3
95	ODD FELLOWS LODGE	263	26%	759	74%	8	1%	3
96	CODEN COMMUNITY HOUSE	90	28%	228	71%	4	1%	3
97	DAUPHIN ISL CHAMBER OF COMM	137	26%	381	73%	1	0%	3
Total	District 3	8,054	27%	22,207	73%	127	0%	
74	RICKARBY PARK	1,005	69%	447	31%	3	0%	Split 1&3
100	Absentee	590	32%	1,236	67%	10	1%	

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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

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January 30, 2007

Honorable Alberto R. Gonzales
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Request for reconsideration pursuant to 28 C.F.R. § 51.45

Dear General Gonzales:

By letter dated January 8, 2007, Assistant Attorney General Wan J. Kim, exercising the authority delegated to him, *see* 28 C.F.R. § 51.3, interposed an objection to the State of Alabama's enforcement of two decisions of the Alabama Supreme Court, Stokes v. Noonan, 534 So. 2d 237 (Ala. 1988), and Riley v. Kennedy, 928 So. 2d 1013 (Ala. 2005). Pursuant to 28 C.F.R. § 51.45, I request reconsideration of the objection.

As I will explain below, these two decisions by the State's highest court were based on generally-applicable,

race-neutral principles. Those principles, which were fairly and properly applied, happened to have been applied in the context of election issues, specifically how vacancies on the Mobile County Commission will be filled. By *its objection* letter, the United States Department of Justice (USDOJ) has essentially declared that Justice Department preclearance supplants the State's Constitution to the extent that, if a law is precleared and later found to be violative of the State Constitution, the preclearance would prevail and leave in effect that otherwise unconstitutional law. This objection, therefore, in essence would override the decisions of the State's highest court and order that Alabama revert to following a law that was declared unconstitutional in Stokes v. Noonan, that was found not to have been revived in Riley v. Kennedy, and that has been very briefly enforced only once. As the State has made clear in its submission letter, denying preclearance is an affront to the State's sovereignty and federalism itself, and it invites chaos in State governmental functioning. In contrast, granting preclearance demonstrates respect for the State's judiciary and for its Legislature. In other words, as I will show, the State has provided the right way to solve the problem, but USDOJ will not let it proceed.

In this letter, I will set forth the relevant facts necessary for a proper understanding of the question presented to USDOJ. Then, I will explain why preclearance can and should be granted.[1]

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[1] Other interested parties submitted comments to USDOJ to consider in deciding whether to preclear Riley v. Kennedy and Stokes v. Noonan. Additionally USDOJ solicited input from certain individuals. The comments and input may have created confusion and thereby contributed to a misunderstanding of the change submitted

BACKGROUND

The State's submission relates to the method of filling vacancies on county commissions. The two decisions submitted for preclearance, Riley v. Kennedy, 928 So. 2d 1013 (Ala. 2005), and Stokes v. Noonan, 534 So. 2d 237 (Ala. 1988), each specifically deal with the Mobile County Commission, though these decisions of the Alabama Supreme Court, like all other decisions of that Court, are applicable throughout the State. To understand the decisions, however, we must necessarily focus, to some extent, on the Mobile County Commission.

Code of 1852 to Code of 1940 - General Law

As to "The Court of County Commissioners," the 1852 Code of Alabama provided that "[i]n case of a vacancy, it is to be filled by the court, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed." Code 1852, § 698. The law was the same when the Revised Code of Alabama was published in 1867. See Code 1867, § 826.

By 1876, a change had occurred: the Governor rather that the Court of County Commissioners would make the appointment to fill any vacancy. Code 1876, § 740 ("In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed."). A notation in the 1876 Code

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for preclearance and the relevant facts. In this letter, I will endeavor to clear up the confusion and to restate the scope of the change in a way that will make it clear that the objection is due to be withdrawn.

suggests that the change dated back to November 25, 1868. The Codes of 1886, 1996, 1907, 1923 and 1940 each continued to provide that "[i]n case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed." Code 1886, § 820; Code 1896, § 952; Code 1907, § 3307; Code 1923, § 6749; Code 1940, T.12, § 6.

Act No. 181, 1957 Regular Session-Creation of Mobile County Commission: Gubernatorial Appointment

In August 1957, Act No. 181 of the 1957 Regular Session of the Alabama Legislature was enacted. Pursuant to Act No. 181, the Mobile County Commission was to come into existence in January 1961 to replace the then-existing board of revenue and road commissioners. Section 2 of Act No. 181 concerned how commissioners were selected and how any vacancies were to be filled. It provided that the commissioners were to be elected to four-year terms and that "Vacancies on the commission shall be filled by appointment by the Governor, but the office of president of the commission shall be filled by the members thereof. Any person appointed to fill a vacancy shall serve the unexpired term, and until his successor is elected and qualified." Act No. 181 § 2(b), 1957 Regular Session of the Alabama Legislature.

The Voting Rights Act of 1965

On August 6, 1965, the Voting Rights Act of 1965 was enacted. Pursuant to that Act, Alabama is a covered jurisdiction for Section 5 purposes. By its terms, Section 5 prohibits certain States and localities, including Alabama, from "enact[ing] or seek[ing] to administer any voting qualification or prerequisite to voting, or stan-

dard, practice or procedure with respect to voting different from that in force or effect" on the "applicable date," unless the jurisdiction obtains preclearance. 42 U.S.C. § 1973c.

Alabama's "applicable date" is November 1, 1964. On that date, vacancies on county commissions, including the Mobile County Commission, were filled by gubernatorial appointment.

Ala. Code § 11-3-6 – Alabama General Law: Gubernatorial Appointment

Ten years passed and the Code of Alabama 1975 was published. The general law concerning vacancies on county commissions that was previously codified at Code 1940, T.12, § 6 was recodified as Ala. Code § 11-3-6. Over the years, there apparently were minor changes in the wording, as, in the 1989 Supplement, Ala. Code § 11-3-6 provided: "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed." Ala. Code § 11-3-6 (1989); cf. Code 1940, T.12, § 6 ("In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.").

Act No. 85-237-Local Law: Special Election

Another ten years passed, and the law continued to be that vacancies on the Mobile County Commission were to be filled by gubernatorial appointment. Against this background, Act No. 85-237 was enacted on April 8, 1985. Act No. 85-237 was a local Act, in that it applied only to Mobile County and not to the State as a whole.

In pertinent part, Act No. 85-237 provided as follows:

> Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve the remainder of the unexpired term.

Act No. 1985-237.

On April 15, 1985, one week after Act No. 85-237 was enacted, the State of Alabama routinely submitted the new Act for review pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The submission was brief, and it apparently considered only Act No. 181 of the 1957 Alabama Legislature, which had created the Mobile County Commission, and not the generally applicable law then codified at Ala. Code § 11-3-6 or the Alabama Supreme Court's decision in Peddycoart v. City of Birmingham, 354 So.2d 808 (Ala.1978).[2] In paragraph (b), the submission explained:

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[2] This statement is intended as one of fact and not blame. Alabama passes a great many general and local laws that fall within the scope of Section 5 review. Over the years, the task of locating, understanding, explaining, and submitting the general laws, and sometimes the local laws, has fallen on lawyers within the Attorney General's Office, who must complete these tasks in addition to their regular duties. Additionally, over the years, the standard for these

> By the Act under which the Mobile County Commission was created, Act No. 181, 1957 Regular Session of the Alabama Legislature (a copy of which is enclosed), a vacancy in the office of County Commissioner was filled by appointment of the Governor. (See Section 2(b) of Act NO. 188 [sic]). Under Act No. 85-237 such vacancies will be filled by calling a special election.

Submission letter, 1 (April 15, 1985). In paragraph (k), the submission reiterated that the "[c]hange will affect how a vacancy in the Office of County Commissioner of Mobile County is filled." Id. at 2. By letter dated June 17, 1985, the State was advised that the Attorney General had no objection.

Stokes v. Noonan

The first time that Act No. 1985-237 was ever to be implemented, that is, the first time that a vacancy on the Mobile County Commission was ever to be filled by a special election, Act No. 1985-237 was challenged in State court and found to be unconstitutional. See Stokes v. Noonan, 534 So. 2d 237 (Ala. 1988).

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submissions has risen, though never more so than with the federal court's decision in Kennedy v. Riley, 445 F.Supp.2d 1333 (M.D.Ala. 2006) (three judge court), discussed below. Prior to that decision, the State had sought to describe the change wrought by the law, as best as that could be ascertained at the time of the submission, and that proved challenging enough as will be seen. The State generally did not anticipate challenges to the changes under State law, unless litigation was already pending or had been threatened. Now, under Kennedy v. Riley, it might well be necessary to test the constitutionality and general soundness of any change under State law before that change can be submitted for Section 5 review.

In 1987, just two years after the enactment of Act No. 1985-237, a vacancy occurred in one of the seats on the Mobile County Commission. In April of that year, Willie H. Stokes, a voter in Mobile County, filed suit against Lionel W. "Red" Noonan, in his official capacity as the Probate Judge for Mobile County. The lawsuit was filed in the Circuit Court of Mobile County. The Circuit Court denied relief, and the vacancy was filled by special election. Samuel L. Jones, who is African-American, won the election, but the lawsuit was not over.

On appeal, in a decision dated September 30, 1988, the Alabama Supreme Court agreed with Plaintiff Stokes that Act No. 85-237 was unconstitutional. The Court explained the constitutional arguments and its holding as follows[3]:

> Stokes contends that the subject of local Act No. 85-237 is subsumed by a general law, § 11-3-6, Code of 1975, and therefore, under Art. IV, § 105, Constitution 1901, and this Court's decision in Peddycoart v. City of Birmingham, 354 So.2d 808 (Ala.1978), is unconstitutional.
>
> Section 105, in pertinent part, states: "No special, private, or local law . . . shall be enacted in any case which is provided by a general law." Section 11-3-6, Code of 1975, is contained in the chapter pertaining to county commissions and refers to vacancies:

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[3] While lengthy block quotes are generally disfavored, I think it important not to simply assert that the Alabama Supreme Court was relying on generally-applicable, race-neutral principles, but to affirmatively demonstrate that fact by reproducing the Court's reasoning.

"In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

Stokes also contends that Act No. 85-237 violates Art. IV, 104(29), Constitution of 1901, which states, in pertinent part:

"The legislature shall not pass a special, private, or local law in any of the following cases:

"...

"(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of organization of new counties, or the changing of the lines of old counties...."

We need not address the plaintiff's attacks under § 104(29) because we are convinced that Act No. 85-237 clearly offends § 105 of the Constitution of 1901.

In Peddycoart v. City of Birmingham, 354 So.2d 808 (Ala.1978), this Court explained at length the difference between a local law and a general law, and, applying the literal language of the Constitution of 1901, held that the presence of a general law upon a given subject was primary, meaning "that a local law cannot be passed upon that subject." This Court added at 813:

"By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute."

Section 11-3-6 is a statewide statute governing the general subject of filling vacancies on county commissions. Its language is substantially the same as its complementary section that appeared in Ala. Code 1940 as Title 12, § 6. See also Ala. Code 1940, Title 12, § 6 (Recomp.1958).

Act No. 85-237 was approved April 8, 1985. By its terms, it is made applicable only to Mobile County. Hence, when it became law it applied to a political subdivision of the state less than the whole, and thus, it was a local law on the same subject as the previously enacted general law, § 11-3-6; see Constitution of 1901, § 110; Peddycoart, 354 So.2d at 814; and, accordingly, it is unconstitutional under § 105. We cannot, therefore, agree with the defendant that the Mobile County Commission, because of statutory history, has always been, and therefore is still, governed by local law. To approve such a proposition here would run directly counter to the language of our constitution. Surely, it cannot be held that the legislature is proscribed from enacting general laws on subjects already covered

> by local laws, even if by application such local laws are repealed, when the intent of the legislature is clear-and it is in this case. See Buskey v. Mobile County Board of Registrars, 501 So.2d 447 (Ala.1986).

Stokes v. Noonan, 534 So.2d at 238-39 (all alterations in original).

Thus, relying on generally-applicable, race-neutral principles, the Alabama Supreme Court held that Act No. 85-237 violated article IV, § 105 of the Alabama Constitution. Given that holding, the Alabama Supreme Court declined to reach Stokes' argument that the Act also violated Article IV, § 104(29).

Note too that, the Alabama Supreme Court expressly rejected the argument that Act No. 181, 1957 Regular Session of the Alabama Legislature – the local law that created the Mobile County Commission – had any impact on the resolution of this case. Stokes v. Noonan, 534 So.2d at 238 ("We cannot, therefore, agree with the defendant that the Mobile County Commission, because of statutory history, has always been, and therefore is still, governed by local law."). As explained above, Act No. 181 is the only preexisting law that had been considered in the submission of Act No. 85-237 for Section 5 review. The submission had not considered Ala. Code § 11-3-6, which is the generally applicable law calling for gubernatorial appointments, or the Alabama Supreme Court's decisions in Peddycoart v. City of Birmingham, 354 So.2d 808 (Ala.1978) and Buskey v. Mobile County Board of Registrars, 501 So.2d 447 (Ala.1986). In short, the Alabama Supreme Court, upon thoughtful consideration and aided by the briefs of the parties and case law that post-dated the submission of Act No. 85-

237 (namely, Buskey), viewed the question entirely differently than the Attorney General had.

Appointing Samuel L. Jones

The Alabama Supreme Court's ruling created a vexing issue of State law. Without a valid election, the incumbent, Samuel L. Jones, who is African-American, had no right to hold the office and was vulnerable to a quo warranto action.[4] Then-Governor Guy Hunt solved the problem by exercising his power of appointment, pursuant to the general law then embodied in Ala. Code § 11-3-6 (1989) (amended 2004), to appoint Mr. Jones to the position.

In other words, the only time that a special election was ever conducted to fill a vacancy on the Mobile County Commission, it was conducted under the cloud of litigation. When the litigation was finally resolved, the

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[4] "Quo warranto" is "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." Black's Law Dictionary 1264 (7th ed. 199 [*sic*]). Such an action is authorized by statute in Alabama. See Ala. Code § 6-6-591. In pertinent part, Ala. Code § 6-6-591 provides as follows:

> (a) An action may be commenced in the name of the state against the party offending in the following cases:
>
> (1) When any person usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, any franchise, any profession requiring a license, certificate, or other legal authorization within this state or any office in a corporation created by the authority of this state;
>
> . . .

Ala. Code § 6-6-591(a)(1) (emphasis added). The statute has not been substantively altered since at least 1940.

State's highest court had held the law purporting to authorize the election (Act No. 85-237) unconstitutional. Stokes v. Noonan. Thereafter, reverting to the long-standing general law of gubernatorial appointment, an African-American individual, Mr. Jones, was appointed to fill the vacancy.

Mr. Jones ran for election when his initial term expired and continued to serve on the Mobile County Commission for approximately eighteen years, until 2005.

Scope of Stokes v. Noonan

Mobile County was not the only county with a local law purporting to authorize a special election to fill a vacancy on a county commission at the time that Stokes v. Noonan was decided. The State is aware of similar local acts in Jefferson County (Act No. 77-784), Randolph County (Act No. 80-291), Houston County (Act No. 86-174), Macon County (Act No. 87-527) and Etowah County (Act No. 88-790). The Macon County law applied only to the election of the Chairman of the County Commission in 1987, so it should be regarded as *sui generis*. While only the Mobile County local law, Act No. 85-237, was at issue in the decision of Stokes v. Noonan, the State believes that, when it was decided, Stokes v. Noonan cast a pall over the other local laws, rendering them vulnerable to the same kind of challenge. That is, each local law was vulnerable to a challenge that it violated article IV, § 105 of the Alabama Constitution because it was a local law purporting to govern a subject the filling of vacancies on county commissions-subsumed by general law, Ala. Code § 11-3-6.

Act No. 2004-455: Authorizing Local Laws

In 2004 the Alabama Legislature amended the general law governing vacancies, Ala. Code § 11-3-6, set out above, when it passed Act No. 2004-455. As amended, the statute provides that vacancies on county commissions are to be filled by gubernatorial appointment "[u]nless a local law authorizes a special election." Ala. Code § 11-3-6 (Supp. 2004).[5] Governor Riley signed the law on May 14, 2004.

Thereafter, on August 9, 2004, the new Act was submitted for Section 5 review. The submission explained that Act No. 2004-455 "ma[de Ala. Code §11-3-6] more gender-inclusive [and] provide[d] that gubernatorial appointment in case of vacancies in the office of county commissioner applies only where local law does not provide for a special election to fill a vacancy." Submission letter, 1 (August 9, 2004). The submission stated that "Act [No.] 2004-455 affects the entire State of Alabama" and explained that the Act "was adopted to permit local law to provide for special elections to fill vacancies in the office of county commissioner." Id. at 2. The submission made no mention of whether Act No. 2004-455 would apply prospectively or retroactively.

The submission did refer to the Stokes v. Noonan decision. Specifically, the submission stated as follows:

> In Stokes v. Noonan, 534 So. 2d 237, 239 (Ala. 1988), the Supreme Court held unconstitutional a local law providing for a special election

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[5] In its entirety, Ala. Code § 11-3-6 now provides: "Unless a local law authorizes a special election, in the case of a vacancy, it shall be filled by appointment by the Governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed." Ala. Code § 11-3-6 (2006 Supp.).

> to fill vacancies on the Mobile County Commission because the local law conflicted with the general law in section 11-3-6. This amendment will allow local law to provide for special elections to fill vacancies in the office of county commissioner under the holding in Baldwin County v. Jenkins, 494 So. 2d 584, 587 (Ala. 1986).

Submission letter, 2 (August 9, 2004). Still, this says nothing about whether Act No. 2004-455 will validate currently existing local laws, or whether it only authorizes the enactment of new local laws.

By letter dated September 28, 2004, the State was advised that the Attorney General had no objection to the proposed change. See DOJ File No. 2004-3515.

Samuel L. Jones Vacates His Seat

A vacancy arose on the Mobile County Commission in September 2005, when Samuel L. Jones, an incumbent commissioner, was elected Mayor of Mobile. Mr. Jones was the very same individual who had been appointed to the Commission after Act No. 85-237 was held unconstitutional and his right to hold the seat pursuant to the special election was threatened.

With the vacancy, the method of filling it became an issue once again. Some contended that the vacancy was to be filled through a special election, pointing to Act 85-237 and arguing that it had been revived by Act No. 2004-455. Others contended that, with the declaration that Act No. 85-237 was unconstitutional in Stokes v. Noonan, the vacancy was to be filled by gubernatorial

appointment pursuant to the general law, Ala. Code § 11-3-6.

Riley v. Kennedy: State Court Litigation

Three plaintiffs, Yvonne Kennedy, James Buskey, and William Clark, filed suit in the Circuit Court of Montgomery County seeking declaratory and injunctive relief. They sought a declaration that the vacancy was due to be filled through a special election and an injunction directing the probate judge of Mobile County to conduct one. Governor Riley was among those named as a defendant. My Office defended the litigation, contending that, with the declaration that Act 85-237 was unconstitutional in Stokes v. Noonan, the Governor was empowered to fill the vacancy by appointment. The Circuit Court ruled in favor of the plaintiffs, and Governor Riley appealed.

Even though the appeal was expedited, the local election officials had to move quickly and asked USDOJ to preclear a special election calendar that included a primary election on November 22, 2005, a run-off election on December 13, 2005, and a general election on January 3, 2006. The local election officials needed the approval of USDOJ in order to start the election machinery. By letter dated October 25, 2005, my Office suggested that USDOJ withhold action on the submittal pending the outcome of the litigation in state court. My Office pointed out that the proceedings in the Supreme Court of Alabama had been expedited and that withholding action was consistent with 28 C.F.R. § 51.22.[6] Disre-

[6] 28 C.F.R. § 51.22 is entitled "premature submissions." It provides as follows:

garding this direction, USDOJ declined to withhold action and interposed no objection to the proposed special election.

On appeal, the Supreme Court of Alabama reversed the judgment of the Circuit Court. Riley v. Kennedy, 928 So.2d 1013 (Ala. 2005). The Court explained the arguments, the holding in Stokes v. Noonan, and its new holding as follows:[7]

> Governor Riley contends that Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975, did not revive Act No. 85-237, Ala. Acts 1985, which this Court had held unconstitutional, see Stokes v. Noonan, and that, therefore, the trial court erred in declaring that the va-

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The Attorney General will not consider on the merits:

(a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or

(b) Any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance. However, with respect to a change for which approval by referendum, a State or Federal court or a Federal agency is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

28 C.F.R. § 51.22.

[7] Again, given that an objection to the enforcement of Riley v. Kennedy was actually interposed, it is important to demonstrate that the Alabama Supreme Court was relying on generally-applicable, race-neutral principles, and that is best done by reproducing the Court's reasoning.

cancy on the Mobile County Commission created by Jones's resignation should be filled by a special election.[FN2]

[FN2]We review this issue only as presented by these facts and by the parties' arguments regarding these facts; we do not address any other possible impediments that may exist to the constitutionality or enforceability of Act No. 85-237.

In Stokes, this Court addressed the constitutionality of Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by a special election when at least 12 months remained on the unexpired term of any commissioner. The registered voter challenging Act No. 85-237 in Stokes argued that Act No. 85-237, a local act, was subsumed by a general law, § 11-3-6, Ala. Code 1975, and, consequently, was unconstitutional under Art. IV, § 105, Alabama Constitution 1901.

Act No. 85-237 provided:

"'Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in

> the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.'"

534 So.2d at 238. We held that Act No. 85-237, applicable only to Mobile County, constituted a local law on the same subject as the previously enacted general law. We then considered § 11-3-6, Ala. Code 1975, which appears in Chapter 3, Title 11, of the Alabama Code pertaining to county commissions. It provided at the time we decided Stokes: "'In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed.'" 534 So.2d at 238. We recognized that § 11-3-6 is clearly a general law, a statewide statute addressing the filling of vacancies on county commissions throughout the State, and that the legislature did not in the language of § 11-3-6, Ala. Code 1975, manifest an intent to except the local law from the general law. Therefore, we held that Act No. 85-237 was contrary to § 11-3-6, Ala. Code 1975, and, consequently, that it violated Art. IV, § 105, Alabama Constitution 1901, which provides, in pertinent part: "No special, private, or local law ... shall be enacted in any case which is provided for by a general law." We reasoned that because the legislature did not in § 11-3-6, Ala. Code 1975, manifest an intent to except the local law from the general law, the contrary local law, in that case Act No. 85-237, must defer to the general law, § 11-3-6, Ala. Code 1975, and, consequently,

we held, Act No. 85-237 violated Art. IV, § 105, Alabama Constitution 1901.

On May 14, 2004, Governor Riley approved Act No. 2004-455 and it became effective. Act No. 2004-455 amends § 11-3-6, Ala. Code 1975, to read as follows: "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala. Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones's resignation. We cannot agree with that conclusion because the language of Act No. 2004-455 does not clearly so indicate.

This Court has consistently held that

> "'statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction. Sutherland Stat. Const., § 41.04 (4th ed 1984).'

> "Dennis v. Pendley, 518 So.2d 688, 690 (Ala.1987)."

Gotcher v. Teague, 583 So.2d 267, 268 (Ala.1991). Moreover, although curative statutes are "of necessity" retroactive, Horton v. Carter, 253 Ala. 325, 328, 45 So.2d 10, 12 (1950), even they are subject to the same rule of statutory construction, i.e., they will not be construed as retroactive unless the intent of the legislature that the statute have such retroactive effect is clearly expressed. The act under consideration in Morton expressly provided: "This Act shall be deemed retroactive in its effect upon its passage and approval by the Governor or upon its otherwise becoming a law." 253 Ala. at 328, 45 So. 2d at 12. On numerous other occasions the legislature has demonstrated its ability to provide expressly for retroactive effect when enacting curative legislation. See, e.g., § 34-8-28(h), Ala. Code 1975 ("The provisions of this amendatory section are remedial and curative and shall be retroactive to January 1, 1998."); § 11-50-16(c), Ala. Code 1975 ("The provisions of this section shall be curative and retroactive ...."); § 11-43-80(d), Ala. Code 1975 ("The provisions of this section shall be curative and retroactive ...."); and Act No. 2001-891, § 5, Ala. Acts 2001 ("It is the intent of the Legislature that this act be construed as retroactive and curative.").

Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala. Code 1975, provides for prospective application only, and that language must be given effect according to its

> terms. Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively. The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is "[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of the county commission." (Emphasis added [by the Riley v. Kennedy Court].) The language "to authorize the Legislature . . . to provide" the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies prospectively only; consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment.

Riley v. Kennedy, 928 So.2d 1013, 1015-17 (Ala. 2005).

Thus, relying on generally-applicable, race-neutral principles, the Alabama Supreme Court held that Act No. 85-237, which had been held unconstitutional in Stokes v. Noonan, was not revived by Act No. 2004-455, which operated prospectively only. With that ruling, there was no State law basis for the proposed (and precleared) special election.

Appointing Juan Chastang

Governor Riley proceeded to appoint Juan Chastang to fill the vacancy in the Mobile County Commission.

Mr. Chastang currently serves as the Commissioner for District 1 and as President of the County Commission. Mr. Chastang is African-American.

Scope of Riley v. Kennedy

Again, Mobile County was not the only county with a local law purporting to authorize a special election to fill a vacancy on a county commission that pre-dated the enactment of Act No. 2004-455. The State is aware of similar local acts in Jefferson County, Randolph County, Houston County, Macon County *(sui generis)* and Etowah County. While only the Mobile County local law, Act No. 85-237, was at issue in the decision of Riley v. Kennedy, the State believes that Riley v. Kennedy casts doubt on any argument that the other local laws had been revived or saved by Act No. 2004-455.[8] While Mobile County's local law is distinguishable from the others in that it had actually been declared unconstitutional, and, hence, it was void *ab initio*, *Ex parte Southern Ry. Co.*, 556 So.2d 1082, 1089-90 (Ala. 1989) (citing cases), the Riley v. Kennedy decision focused entirely on retroactivity. Accordingly, this distinction is not likely to be persuasive to a court in the event that one of the other local laws is challenged.

Summarizing the History of Appointments to Fill Vacancies on the Mobile County Commission

To reiterate, Juan Chastang, like Samuel L. Jones before him, was appointed to fill a vacancy on the Mobile

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[8] An Attorney General's opinion that concerns the operation of Act No. 2004-455 as applied to Houston County is clearly marked: "DO NOT CITE – See Riley v. Kennedy, Ala. Sup. Ct., Case No. 1050087 (Nov. 9, 2005)." Opinion to Honorable Steve Clouse, Att'y Gen'l Opn. 2004-215 (Sept. 7, 2004).

County Commission. Since the inception of the Mobile County Commission, there has been only one special election conducted to fill a vacancy on that Commission, and that election was conducted under the cloud of litigation that ultimately resulted in the law purporting to authorize the election (Act No. 85-237) being held unconstitutional. See Stokes v. Noonan. Then-Governor Guy Hunt responded to the Alabama Supreme Court's decision in Stokes v. Noonan by appointing the winner of the special election, Samuel L. Jones, to the seat. Hence, in the 45-year history of the Mobile County Commission, there were only approximately three years during which it was thought, albeit incorrectly, that a special election might be authorized to fill a vacancy on that Commission.[9] The rest of the time, the generally applicable law of gubernatorial appointment applied. When a vacancy arose in 2005, it was filled by appointment.

In fact, viewed from this perspective, Riley v. Kennedy did not cause a change at all, at least not in Mobile County. Stokes v. Noonan had held that Act No. 85-237

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[9] As set out above, the Mobile County Commission came into being in January 1961. At that time, both generally applicable law (now codified at Ala. Code § 11-3-6) and the Act creating the Commission (Act No. 181, 1957 Regular Session of the Alabama Legislature) called for gubernatorial appointment in the event of a vacancy. More than twenty years passed before Act No. 85-237 was enacted and purported to change the method of filling a vacancy on the Mobile County Commission from gubernatorial appointment to special election. The Act was approved April 8, 1985 and the State was informed that the Attorney General had no objection on June 17, 1985. Two years later, in April 1987, Willie H. Stokes filed suit challenging the constitutionality of Act No. 85-237 on dual grounds. The Alabama Supreme Court issued its decision holding Act No. 85-237 unconstitutional on September 30, 1988, barely three years after it was approved. Application of Act No. 85-237 had been attempted only once.

was unconstitutional, and, hence, that any vacancy on the Mobile County Commission had to be filled by gubernatorial appointment. Under Alabama law, an Act that is declared unconstitutional is void *ab initio*. *Ex parte Southern Ry. Co.*, 556 So.2d 1082, 1089-90 (Ala. 1989) (citing cases). Riley v. Kennedy held that nothing had changed; Act No. 85-237 still could not be enforced. Outside of Mobile County, Riley v. Kennedy did have more of an impact, in that it cast doubt on any argument that the other local laws had been revived or saved by Act No. 2004-455. Cf. Opinion to Honorable Steve Clouse, Att'y Gen'l Opn. 2004-215 (Sept. 7, 2004).

Kennedy v. Riley: Federal Court Litigation

The Alabama Supreme Court handed down its decision in Riley v. Kennedy on November 9, 2005. By letter dated the next day, my Office wrote to inform USDOJ of the Alabama Supreme Court's decision. Thereafter, on November 16, 2005, the Riley v. Kennedy plaintiffs filed suit in federal district court.

The new complaint asserted that the Riley v. Kennedy decision wrought a change in existing law. The prayer for relief asked that the court declare that the Governor lacked the authority to appoint Mr. Jones' successor absent preclearance. The complaint made no mention of Stokes v. Noonan, but did seek to prevent a gubernatorial appointment, or to undermine any appointment that had already occurred. Subsequent briefing found the plaintiffs arguing that both Stokes v. Noonan and Riley v. Kennedy required preclearance to be enforceable.

My Office vigorously defended the lawsuit on behalf of Governor Riley, the only named defendant. In our

Answer, we asserted that "Governor Riley's power of appointment stems from a [S]tate law that was in effect before November 1, 1964, and that, as subsequently modified and precleared, preserves that power '[u]nless a local law authorizes a special election ....' No valid [S]tate law authorizes a special election to fill a vacancy on the Mobile County Commission." Answer, 2 (emphasis added).[10] We further asserted that "[t]he United States cannot tell a State what [S]tate law is without running afoul of the Tenth Amendment to the United States Constitution." Id. at 3. We clearly took the position that '[t]he Alabama Supreme Court's decision in Riley v. Kennedy does not effect a change in standard, practice, or procedure with respect to voting." Id.

Trial briefs were filed by both parties. In our briefing, we contended that requiring preclearance of decisions made in the course of the ordinary appellate process that invalidated precleared changes were not changes in voting. Instead, any State statute within the scope of Section 5 must be both valid as a matter of State law and precleared if it is to be enforceable. Preclearance does not speak to validity under State law. Moreover, preclearance cannot speak to validity under State law without raising grave constitutional questions. Certainly, preclearance cannot override a State's Constitution to act as a savings clause that requires a law that conflicts with a State's Constitution to, nonetheless, be enforced. In our initial brief, we put it this way:

> Preclearance of a state statute cannot validate an otherwise invalid state law without running afoul of the Tenth Amendment to the

[10] The reference is to Ala. Code § 11-3-6, as modified by Act No. 2004-455.

> United States Constitution. Preclearance is an action by federal authorities that makes a valid state statute enforceable. Without a valid state law, though, a preclearance letter, like the letters relating to Act No. 85-237 and the local election in this case, is null, void, and of no effect. If that were not the case, the Voting Section of the Civil Rights Division of the United States Department of Justice . . . would be making state law.

Trial Brief of Governor Riley, 4-5.

In supplemental briefing, we predicted the exact problem now facing the State. We contended as follows:

> [T]he relief the Kennedy Plaintiffs seek is fraught with constitutional problems. Requiring the State to submit Stokes v. Noonan, or Riley v. Kennedy, for preclearance begs the question what would happen if USDOJ, with or without input from the Kennedy Plaintiffs or their supporters, objected. The State might then be compelled to conduct a special election under a state law that is unconstitutional and cannot be revived retroactively [, namely Act No. 85-237]. In that case, USDOJ would be making state law, and commandeering state officials in violation of the Tenth Amendment. Put differently, Section 5 would be unconstitutional as applied to the facts of this case.

Supplemental Brief of Governor Riley, 5.

Unfortunately, the three judge court agreed with the plaintiffs and held that the Stokes v. Noonan and Riley v.

Kennedy decisions could not be enforced unless they were precleared. Kennedy v. Riley, 445 F.Supp.2d 1333 (M.D. Ala. 2006). The heart of the court's reasoning was as follows:

> In reviewing the plaintiffs' § 5 claim, we are tasked with the limited purpose of determining "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate." City of Lockhart v. United States, 460 U.S. 125, 129 n. 3, 103 S. Ct. 998, 74 L.Ed.2d 863 (1983). Because it is undisputed that Stokes v. Noonan and Riley v. Kennedy were not precleared, the critical inquiries for this court are whether these decisions brought about a change covered by § 5, and, if so, the appropriate remedy.
>
> In determining whether a change covered by § 5 occurred, we must first determine if there was, in fact, a change. Changes are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect. Abrams v. Johnson, 521 U.S. 74, 96-97, 117 S. Ct. 1925, 138 L.Ed.2d 285 (1997) (citing 28 CFR § 51.54); Gresham v. Harris, 695 F. Supp. 1179, 1183 (N.D.Ga.1988) (three judge court), aff'd sub nom. Poole v. Gresham, 495 U.S. 954, 110 S. Ct. 2556, 109 L.Ed.2d 739 (1990).
>
> Here, the parties dispute what constitutes the baseline practice. The plaintiffs argue that the baseline is Act No. 85-237, which provided

for the filling of the vacancy on the Mobile County Commission by special election; they maintain that Stokes v. Noonan and Riley v. Kennedy were changes because the former invalidated the Act and the latter still refused to enforce it. The State responds that the baseline could not be Act No. 85-237 because the Alabama Supreme Court declared it unconstitutional; the State posits that Stokes v. Noonan and Riley v. Kennedy did not reflect a change but were rather a mere reaffirmation of the correct scope of the governor's preexisting appointment power under Alabama general law.

We think the plaintiffs have the better argument. Because Act No. 85-237 was the most recent precleared practice put into force and effect with the election of Jones in 1987, it is the baseline against which we must determine if there was a change. To be sure, the Alabama Supreme Court declared Act No. 85-237 unconstitutional under state law; this was, however, after Act No. 85-237 had been put into effect. We are required to determine the baseline "without regard for [its] legality under state law." Lockhart, 460 U.S. at 133, 103 S. Ct. 998 (relying on Perkins v. Matthews, 400 U.S. 379, 394-395, 91 S. Ct. 431, 27 L.Ed.2d 476 (1971)).

We therefore hold that, because Act No. 85-237 is the baseline and because Stokes v. Noonan invalidated Act No. 85-237 and Riley v. Kennedy held that Act No. 85-237 was not rendered enforceable by Act No. 2004-455, the two decisions constituted changes that should have

> been precleared before they were implemented. In reaching this holding, we emphasize that we are in no way disputing the rulings of the Supreme Court of Alabama, the reasoning underlying the rulings in these two cases, or that the governors acted in accordance with state law in making the appointments. Indeed, this court does not have jurisdiction to address such purely state-law questions. Whether Act No. 85-237 is, in fact, unconstitutional under state law and whether positions on the Mobile County Commission must be filled by special election or gubernatorial appointment are state-law questions we do not reach and should not be understood in any way as reaching; our holding today does not in any way undermine these two decisions under state law. We merely hold that federal law requires that they be precleared before they are implemented.

Kennedy v. Riley, 445 F.Supp.2d 1333, 1336-37 (M.D. Ala. 2006) (alterations by the court).

The court allowed the State time to seek preclearance before taking up the issue of remedy. Originally the State was allowed 90 days to obtain preclearance, Judgment, dated August 18, 2006, but that time was extended upon an unopposed motion for more time, Order, dated November 16, 2006. Upon USDOJ's decision to interpose an objection, the State was granted additional time to seek reconsideration, Order, dated January 11, 2007; Order, dated January 29, 2007 (denying plaintiffs' request for reconsideration of the January 11, 2007 order).

Act No. 2006-342

While the federal litigation was on-going in Kennedy v. Riley, the Alabama Legislature passed, and the Governor signed, Act No. 2006-342. That Act was the legislative response to the Alabama Supreme Court's decision in Riley v. Kennedy: if Act No. 2004-455 (authorizing local laws) could not revive Act No. 85-237 (Mobile County's old local law, which had been found unconstitutional in Stokes v. Noonan), then a new local law was needed. Act No. 2006-342 was that new local law. In pertinent part, it provided:

> Whenever a vacancy occurs in any seat on the Mobile County Commission with 12 months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election no sooner than 60 days and no later than 90 days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.

Act No. 2006-342.

To the State's knowledge, no declaratory judgment action has been filed to test the constitutionality of Act No. 2006-342, and no entity has submitted the Act for preclearance.

The State believes that the proper treatment of Act No. 2006-342 holds the key to the resolution of this issue. If Act No. 2006-342 is submitted for preclearance and precleared, it will govern future vacancies on the Mobile

County Commission. The appointment of Juan Chastang, like the special election/ appointment of Samuel L. Jones, will be a one-time event. Moreover, the decisions of the Supreme Court of Alabama will be given due respect, the authority of State officials will not be commandeered, and State officials will not be directed to conduct a special election for which there is no State law authority. Cf. Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365 (1997).

The Preclearance Submission and Objection

As a direct result of the three judge federal court's decision in Kennedy v. Riley and without waiving its objections, the State submitted the Alabama Supreme Court decisions in Stokes v. Noonan and Riley v. Kennedy for preclearance.[11] The submission was made on November 9, 2006.

While the submission asked for preclearance of the two decisions by the Alabama Supreme Court, it also spoke in terms of filling vacancies on the Mobile County Commission and specifically described the scope of the change as limited solely to that particular Commission. Submission letter, 1-4, 6 (November 9, 2006).

The State's submission also explained the "difficult position" that the federal court's decision put it in: "The State agrees that, when statutes make changes that affect voting, they must be precleared. Nothing, however,

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[11] To note the obvious, the Attorney General reviews submissions and interposes an objection to those changes which come within the purview of Section 5 and which are thought to be retrogressive. Were USDOJ to agree with Alabama that the changes submitted are not properly subject to Section 5 review, it would be appropriate for the Attorney General to refrain from interposing an objection.

immunizes those statutes from challenge under [S]tate law, and the preclearance of a statute cannot pretermit the State's litigation process. This is particularly the case where race-neutral, generally-applicable principles of law are applied." Submission letter, 7 (November 9, 2006).

By letter dated November 28, 2006, counsel for the plaintiffs in the Kennedy v. Riley and Riley v. Kennedy, litigation, acting on their behalf, commented on the State's submission. A copy of that comment was provided to the State.

By letter dated January 8, 2007, Assistant Attorney General Wan J. Kim, exercising the authority delegated to him, see 28 C.F.R. § 51.3, interposed an objection to the State of Alabama's enforcement of the Alabama Supreme Court's decisions in Stokes v. Noonan and Riley v. Kennedy.

The objection letter indicated that additional comments may have been submitted without copy to the State. By letter dated January 9, 2007, the State has requested that USDOJ provide it with copies of any additional records concerning this submission. Those records were provided to the State by letters dated January 17, 2007 and January 25, 2007. The records include several documents entitled Memorandum of Telephonic Communication, which have been blacked-out to some extent to protect personal privacy. The vast majority of phone calls focus on the Juan Chastang appointment. Additionally, one of the plaintiffs in the Kennedy v. Riley and Riley v. Kennedy litigation faxed Act No. 2006-342 to USDOJ.

THE OBJECTION SHOULD BE WITHDRAWN

It is the State's position that the objection should be withdrawn, and that Alabama should be permitted to enforce the decisions in Stokes v. Noonan and Riley v. Kennedy. The State believes that USDOJ has erroneously narrowed the scope of the change submitted for consideration and that this error has contributed to a flawed view of the relevant facts. Moreover, further analysis prompted by the comments of other interested parties and the USDOJ objection letter has caused the State to believe that restating the scope of the change would eliminate confusion and make it clear that the objection should not have been interposed and is due to be withdrawn.

More concretely, the State submitted for review a change to the method of filling vacancies on the Mobile County Commission. Submission letter, 1-4, 6 (November 9, 2006). In contrast, USDOJ reviewed, and objected to, the filling of the District 1 seat vacated in September 2005 by Samuel L. Jones. Properly construed, the change at issue, and the change due to be further considered, concerns the method of filling vacancies on county commissions that have local laws which pre-date Act No. 2004-455 and authorize special elections to fill said vacancies.

The Norm

It is important to understand that, in Alabama, appointment is the norm for filling vacancies on county commissions. The use of a special election to fill these vacancies is a deviation from the norm. Of Alabama's 67 counties, only six, one of them *sui generis*, have local laws authorizing the filling of vacancies on their county

commissions by special election. Appointments date back to the 1852 Code of Alabama, while special election laws, like Act No. 85-237, are of a more recent vintage and have been found to violate the State Constitution.[12] Stokes v. Noonan. This is the perspective from which Alabama's submission should be viewed.

In contrast, the objection letter is apparently premised upon the idea that special elections are the norm and that Alabama is attempting this one time to use an appointment to deny the people their right to vote. The objection letter conveys this idea by focusing on Act No. 85-237 and on Act No. 2006-342, essentially sandwiching the Juan Chastang appointment between these two Acts and insisting that the Acts are enforceable and that Act No. 85-237 has been enforced. See Objection letter, 1-2. A key portion of the letter states:

> Pursuant to Act No. 85-237, a vacancy on the Mobile County Commission is to be filled through popular election by the voters within the relevant single-member district. That statute was precleared by the Attorney General under Section 5 on June 17, 1985 (File No. 1985-1645), and was first implemented in a 1987 District 1 special election. Pursuant to a decision of the Alabama Supreme Court in Stokes v. Noonan, that method of filling vacancies was changed from election by the voters of the district to appointment by the Governor of Alabama in 1988, and reaffirmed by Riley v. Kennedy in 2005.

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[12] Gubernatorial appointments date back to about 1868. Prior to that, vacancies on the Court of County Commissioners were filled by that Court. Code 1852, § 698; Code 1867, § 826.

Pursuant to the decision of the three judge federal panel in Kennedy v. Riley, the State has submitted the changes effected by Stokes v. Noonan and Riley v. Kennedy for review under Section 5 of the Voting Rights Act. Additionally, we understand that Alabama law has changed, legislatively reversing the decision in these cases and restoring the authority to fill vacancies to the voters themselves in future elections. This is the effect of Act No. 2006-342, which was signed by the Governor on April 12, 2006, and which would govern all future vacancies. The question before us, therefore, is limited to whether the change effected by Stokes v. Noonan and Riley v. Kennedy will lead to impermissible retrogression, caused by the appointment, rather then election, of an individual to fill a vacancy on the Mobile County Commission for a term expiring in 2008.

. . .

Thus, the last precleared procedure for filling vacancies in the Mobile County Commission that was in force or effect was the special election method set forth in Act No. 85-237. Kennedy, 445 F. Supp. 2d at 1336. This Act remains in full force and effect, as it affects voting, was precleared, and was implemented in the 1987 special election cycle. See Young v. Fordice, 520 U.S. 273, 282-83 (1997); Lockhart, 460 U.S. at 132-33. It is therefore the benchmark against which we measure the proposed change to fill vacancies by appointment of the Governor of Alabama.

Objection letter, 1-2.[13]

The letter fails to acknowledge that gubernatorial appointment was the long-standing norm, prior to the enactment and preclearance of Act No. 85-237. Code 1876, § 740; Code 1886, § 820; Code 1896, § 952; Code 1907, § 3307; Code 1923, § 6749; Code 1940, T. 12, § 6. Before gubernatorial appointments, vacancies on the Court of County Commissioners were filled by that Court. Code 1852, § 698; Code 1867, § 826. Special elections were not the norm.

The letter fails to acknowledge that the Alabama Supreme Court's decisions in Stokes v. Noonan and Riley v. Kennedy were grounded in well-established legal principles. The decisions were neither racially motivated nor based on specious rationales advanced to reach a particular result. The Alabama Supreme Court did not simply decide that it preferred appointments. Rather, it held, based on generally-applicable, race-neutral princi-

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[13] USDOJ's reliance on Young v Fordice is misplaced. There, the Supreme Court held that a plan that was in effect for only a short time and was abandoned for State law reasons, though it was precleared, had not properly moved the baseline because it was never "in force or effect." 520 U.S. 282-83. In the same way here, Act 85-237 was in effect for only a short time, and the first attempt to use it provoked a legal challenge. While a special election was held, that election was the result of the vagaries of the litigation process; if the Circuit Court had enjoined the election as Plaintiff Stokes wanted, and as the Alabama Supreme Court's decision held it should have, there would have been no election to which to point. In any event, Act 85-237 was abandoned as soon as its unlawfulness became apparent and then-Governor Hunt exercised his power of appointment. Just as in Fordice, Act 85-237 was never truly "in force or effect."

ples, that Act No. 85-237 was unconstitutional and could not be revived by a later-dated prospective Act.[14]

The letter also fails to acknowledge that the unconstitutionality of Act No. 85-237 impacts its enforceability. The letter further fails to acknowledge that, after the Supreme Court's decision in Stokes v. Noonan was handed down, then-Governor Guy Hunt appointed Samuel L. Jones to the seat he had won during the invalid special election in order to protect Mr. Jones from an action to oust him. Additionally, the letter fails to consider how these actions undermine the assertion that Act No. 85-237 "was first implemented in a 1987 District 1 special election." See Objection letter, 2. And, finally, the letter fails to acknowledge that Samuel L. Jones and Juan Chastang are African-American.

Improper Reliance on Act No. 2006-342

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[14] In this way too, the current situation is different from Lockhart, upon which USDOJ relied. In Lockhart, the United States Supreme Court dealt with a situation where a city had not followed State law for approximately 50 years and then sought to invoke non-followed State law in preclearance. City of Lockhart v. United States, 460 U.S. 125, 132-33, 103 S. Ct. 9981, 1003 (1982). The Court noted "[w]e doubt that Congress intended to force either [the Attorney General of the United States of the District Court for the District of Columbia] into speculation as to state law." Id. at 133, n.8. Here, the Alabama Supreme Court has clearly explained what State law requires, and it requires gubernatorial appointment.

The Lockhart Court relied on Perkins v. Matthews, 400 U.S. 379, 91 S. Ct. 431 (1971), for its conclusion that the local practice being enforced mattered more than the contradictory State law. Lockhart 460 U.S. at 132-33, Perkins involved Canton's inexplicable and unexplained failure to follow Mississippi law on Mississippi's "applicable date." Perkins, 400 U.S. at 395. It is, therefore, distinguishable.

While the letter fails to acknowledge and consider all these things, an equally great error is found in the fact that the letter improperly acknowledges, and firmly relies upon, Act No. 2006-342. That Act has not yet been submitted for preclearance. In fact, I find no mention of its existence in the State's submission.[15] There is a good reason for that. The three judge court told the State, over its objection, to submit the decisions in Stokes v. Noonan and Riley v. Kennedy. That is what the State did. Moreover, accepting for the sake of argument the three judge court's determination that these decisions represented a change and required preclearance, Act No. 2006-342 is the next change and needs its own submission. There was no need to submit Act No. 2006-342, and it was not appropriate for USDOJ to consider it, until the decisions in Stokes v. Noonan and Riley v. Kennedy had been considered and precleared.

Further, the State has cause to hesitate before making the submission of Act No. 2006-342. If the federal court decision in Kennedy v. Riley stands, then my Office will have an obligation to assure itself of the constitutionality of a change before submitting that change for preclearance. Otherwise, preclearance of an Act would substitute USDOJ for the State's litigation process and the State's Constitution as the gauge for measuring the validity of that Act under State law. As absurd as such a result appears—that the State may be told to apply an invalid State law because it was precleared—Alabama now finds itself in precisely that position.[16] I would note

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[15] Act No. 2006-342 apparently came to the attention of USDOJ as a result of comments made by other interested parties.

[16] You will recall that there were two challenges to the constitutionality of Act No. 85-237. While the passage of Act No. 2004-455 eliminates one of the grounds asserted by Plaintiff Stokes, the other

that this is an uncomfortable role for my Office to have to assume; we are accustomed to defending State statutes, not attacking them to test whether they violate the State Constitution. Moreover, given the case or controversy requirement, there may be no mechanism for this Office to test the constitutionality of statutes before seeking preclearance.

All of which is to say, that I believe USDOJ has erred in assuming that Act No. 2006-342 is valid and enforceable and will "govern all future vacancies." Objection letter, 2. That error is compounded by the fact that the existence of this Act apparently led USDOJ to narrowly construe the change under consideration to the point of considering a single appointment. Stokes v. Noonan and Riley v. Kennedy are not applicable to a single district in a single county in a single year. These decisions cast a pall on certain local laws existing in five other counties, and the Stokes v. Noonan decision has been the settled law of Alabama for nearly 20 years.

Moreover, this reality illuminates the possibility that a comment by the Kennedy v. Riley plaintiffs led USDOJ to focus on the wrong facts. The plaintiffs commented that "the voters of Mobile County Commission District 1 have different political preferences than Gov. Riley. In the recent gubernatorial election, the voters of District 1 cast only 40% of the [sic] votes for Gov. Riley, while the other two Districts voted 73% for Riley." Comment, 2 (November 28, 2006) (footnote omitted). These facts appear to have influenced USDOJ, as the objection letter

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has not been so addressed, and additional constitutional concerns might exist. Based on footnote 2 in the Riley v. Kennedy decision, quoted above, it appears this fact has not escaped the attention of the Alabama Supreme Court either.

stated: "there is no dispute that the change would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters of District 1." Objection letter, 3. These facts, however, are irrelevant. Because Stokes v. Noonan and Riley v. Kennedy are applicable to more than a single district in a single county in a single year, it is entirely irrelevant who currently holds the Office of Governor or how one particular district of the Mobile County Commission voted in the 2006 gubernatorial election.[17]

With all due respect, the existence of Act No. 2006-342 also appears to have confused the analysis. In addition to using the very existence of an un-submitted Act to unilaterally redefine the scope of the change submitted, USDOJ has taken the unusual step of suggesting that Act No. 2006-342 need not be submitted for preclearance, Objection letter, 3, while simultaneously announcing that "[b]ecause the changes pursuant to Stokes and Riley were never precleared, they cannot serve as a benchmark," Objection letter, 2. Alabama has not asked that Stokes v. Noonan and Riley v. Kennedy be the benchmark; it has asked that they be precleared. Once they are precleared, those Alabama Supreme Court decisions will serve as the benchmark for future submissions. Preclearance of these decisions will more clearly delineate the appropriate benchmark.

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[17] If the experiences of the Mobile County Commission alone matters, USDOJ is reminded that both times gubernatorial appointments have been used to fill vacancies on the Mobile County Commission, Republican governors appointed African-American individuals to the positions.

In the federal court litigation, the State did dispute what the benchmark should be, but that dispute was over whether Act No. 85-237 could serve as a benchmark when it was unconstitutional. There has never been a dispute over whether Stokes v. Noonan and Riley v. Kennedy can serve as benchmarks. Such a dispute could only arise if the State had acted to submit Act No. 2006-342 for preclearance before achieving either preclearance of those decisions or a decision from a three judge federal court that preclearance of the Supreme Court decisions was not needed.

Again, the proper treatment of Act No. 2006-342 is the key. When that Act becomes enforceable, the Legislature's intent can be carried out in a way that does not involve disrespect for the Supreme Court of Alabama. The decisions in Stokes v. Noonan and Riley v. Kennedy do not mean that the Legislature is powerless; they mean that the Legislature must exercise the powers it has consistently with the Constitution of Alabama and generally applicable law.

The Proper Benchmark: Young v. Fordice

With respect to the question of benchmark, the Kennedy v. Riley three judge court held that: "We are required to determine the baseline 'without regard for [its] legality under state law.' Lockhart, 460 U.S. at 133, 103 S.Ct. 998 (relying on Perkins v. Matthews, 400 U.S. 379, 394-395, 91 S. Ct. 431, 27 L.Ed.2d 476 (1971))." (alteration by the court). Likewise, USDOJ has relied on Lockhart and Perkins, as well as the Supreme Court's decision in Young v. Fordice, 520 U.S. 273, 117 S. Ct. 1228 (1997). Objection letter, 2. Alabama takes the position the Supreme Court's unanimous decision in Young

supports the State's position, distinguishing this case from the situations in Lockhart and Perkins.

Young arose from changes made by Mississippi to its voter registration system. The Supreme Court spoke in terms of an "Old System," a "Provisional Plan" and a "New System." Id. at 276-277. Mississippi briefly transitioned from the Old System to the Provisional Plan in an attempt to comply with the National Voter Registration Act of 1993. Id. at 275-76. State officials began implementing the Provisional Plan under the assumption that State law would be altered to authorize it. Id. at 277-78. Moreover, State officials submitted the Provisional Plan for preclearance, which was granted. Id. at 277-79. Thereafter, the Mississippi Legislature failed to authorize the Provisional Plan, and State officials quickly abandoned it in favor of the New System. Id. at 278-279. That New System was not submitted for preclearance and litigation ensued. Id. at 280-81.

The United States Supreme Court concluded that the New System required preclearance, not because it was a change from the Provisional Plan but because it was a change from the Old System. Id. at 281-85. The Court's reasoning is instructive, and highly applicable to Alabama's situation.

The Plaintiffs and USDOJ "argue[d] that the Provisional Plan, because it was precleared by the Attorney General, became part of the baseline against which to judge whether a future change must be precleared." Id. at 282. The district court "rejected this argument on the ground that the Provisional Plan was a misapplication of state law, never ratified by the State." Id. at 281. The United States Supreme Court agreed: "We, too, believe that the Provisional Plan, in the statute's words, was

never 'in force or effect.' 42 U.S.C. § 1973c." Id. at 282. The Court explained its agreement as follows:

> The District Court rested its conclusion upon the fact that Mississippi did not change its state law so as to make the Provisional Plan's "unitary" registration system lawful and that neither the Governor nor the legislature nor the state attorney general ratified the Provisional Plan. The appellants argue that the simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never "in force or effect." We agree. A State, after all, might maintain in effect for many years a plan that technically, or in one respect or another, violated some provision of state law. Cf. Perkins v. Matthews, 400 U.S. 379, 394-395, 91 S. Ct. 431, 440, 27 L.Ed.2d 476 (1971) (deeming ward system " in fact 'in force or effect' " and requiring change from wards to at-large elections to be precleared even though ward system was illegal and at-large elections were required under state law (emphasis in original)); City of Lockhart v. United States, 460 U.S. 125, 132-133, 103 S. Ct. 998, 1003-1004, 74 L.Ed.2d 863 (1983) (numbered-post election system was "in effect" although it may have been unauthorized by state law). But that is not the situation here.
>
> In this case, those seeking to administer the Provisional Plan did not intend to administer an unlawful plan. They expected it to become lawful. They abandoned the Provisional Plan as soon as its unlawfulness became apparent, i.e.,

> as soon as it became clear that the legislature would not pass the laws needed to make it lawful. Moreover, all these events took place within the space of a few weeks. The plan was used to register voters for only 41 days, and only about a third of the State's voter registration officials had begun to use it. Further, the State held no elections prior to its abandonment of the Provisional Plan, nor were any elections imminent. These circumstances taken together lead us to conclude that the Provisional Plan was not "in force or effect"; hence it did not become art of the baseline against which we are to judge a whether future change occurred.

Young, 520 U.S. at 282-83 (emphasis added, except where otherwise noted).

While one special election was conducted pursuant to Act 85-237 (resulting in the election of Mr. Samuel L. Jones), that election was conducted under the cloud of litigation that ultimately resulted in Act No. 85-237 being held unconstitutional. Stokes v. Noonan. Under Alabama law, an Act that is declared unconstitutional is void *ab initio*. *Ex parte Southern Ry. Co.*, 556 So.2d 1082, 1089-90 (Ala. 1989) (citing cases). Then-Governor Guy responded to the Stokes v. Noonan decision by appointing Mr. Jones to the Commission. Hence, Act No. 85-237 was only very briefly enforced. In this way, it is very different from the situations in Lockhart and Perkins where the covered jurisdictions had a long-standing practice in violation of State law.

While I recognize that Alabama's situation is distinguishable from Young in that an election was conducted, I do not read Young to make the conduct of one election,

standing alone, dispositive, especially given that the special election was conducted while litigation challenging Act No. 85-237 was pending. Under Young, USDOJ should not consider whether Stokes v. Noonan and Riley v. Kennedy represent a retrogression from Act No. 85-237, but whether these decisions represent a retrogression from the practice which existed prior to the passage of that Act. Because these decisions return the State to the prior practice, the answer is "no", and USDOJ should not object.

Scope of Stokes v. Noonan and Riley v. Kennedy

Mobile County was not the only county with a local law purporting to authorize a special election to fill a vacancy on a county commission at the time that Stokes v. Noonan was decided. The State is aware of similar local acts in Jefferson County (Act No. 77-784), Randolph County (Act No. 80-291), Houston County (Act No. 86-174), Macon County (Act No. 87-527) and Etowah County (Act No. 88-790). The Macon County law applied only to the election of the Chairman of the County Commission in 1987, so it should be regarded as *sui genesis*.

While only the Mobile County local law, Act No. 85-237, was at issue in the decision of Stokes v. Noonan, the State believes that Stokes v. Noonan casts a pall over the other local laws, rendering them vulnerable to the same kind of challenge. Likewise, the State believes that the Riley v. Kennedy decision casts doubt on any argument that those local laws are saved by Act No. 2004-455.[18]

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[18] For proof of this, one need look no further than the Opinion to Honorable Steve Clouse, Att'y Gen'l Opn. 2004-215 (Sept. 7, 2004), which concerns the operation of Act No. 2004-455 as applied to

While Mobile County's local law is distinguishable from the others in that it had actually been declared unconstitutional, and hence it was void *ab initio*, *Ex parte Southern Ry. Co.*, 556 So.2d 1082, 1089-90 (Ala. 1989) (citing cases), the Riley v. Kennedy decision focused entirely on retroactivity. Accordingly, this distinction is not likely to be persuasive to a court in the event that one of the other local laws is challenged.

The objection letter gave some weight to census data for the area contained within District 1 of Mobile County. It is inappropriate to focus solely on the demographics of District 1 of Mobile County when, at a minimum, the changes encompassed by the submission impact all of Mobile County. Moreover, given the statewide applicability of the Supreme Court's decisions, to the extent that any population data is relevant, it is necessary to consider all of Mobile County and the five other counties known to have similarly vulnerable local laws, and to do it with some sense of the State information. Based on information currently available from the U.S. Census Bureau website, the data are as follows:

Jurisdiction	**Population** (2005 estimate)	**White** (2005)	**Black** (2005)	**Other** (derived)
State of Alabama	4,557,808	71.4%	26.4%	2.2%
Etowah County	103,189	83.8%	14.6%	1.6%

Houston County and is clearly marked: "DO NOT CITE – See Riley v. Kennedy, Ala. Sup. Ct., Case No. 1050087 (Nov. 9, 2005)."

Houston County	94,249	72.2%	25.9%	1.9%
Jefferson County	657,229	56.8%	41.2%	2.0%
Macon County	22,810	15.7%	82.8%	1.5%
Mobile County	401,427	62.2%	34.5%	3.3%
Randolph County	22,717	76.8%	22.1%	1.1%

The November 28, 2006, comment by Plaintiffs' counsel made much of special elections that Plaintiffs contend were held in Houston County and in Etowah County. Comment, 4 (November 28, 2006). As to Houston County, the comment notes the existence of Opinion to the Honorable Steve Clouse, No. 2004-215 (September 7, 2004).[19] That opinion explained the holding of Stokes v. Noonan and that Act No. 2004-455 had been passed but was not yet precleared and, thus, was not yet enforceable. The opinion went on to state that, once the Act has been precleared, a vacancy occurring after the enactment date of Act No. 2004-455 should be filled by special election. While the comment relies on this final statement, it neglects to mention that the opinion has been marked: "DO NOT CITE – See Riley v. Kennedy, Ala. Sup. Ct., Case No. 1050087 (Nov. 9, 2005)." The fact that a special election might have been held in Houston

[19] Attorney General opinions are not binding law, though the courts sometimes find the opinions persuasive. Anderson v. Fayette County Bd. of Educ., 738 So.2d 854, 858 (Ala. 1999) (citing cases).

County in reliance on that opinion pales in importance to the reality that any such special election was unauthorized under Stokes v. Noonan and Riley v. Kennedy.

As to Etowah County, the comment hints that an unprecleared special election was held there, and notes that the district voting was majority white, as if that fact were at all relevant or explanatory. First, if the election was held and was not precleared, it was in violation of federal law in addition to being in violation of State law (Stokes v. Noonan). Second, the comment says that the Secretary of State's website revealed that the election was on April 26, 2005. If that is true, then, like any special election held in Houston County, the Etowah County special election predated the Riley v. Kennedy decision.

The fact that there was some confusion about the interplay between. Stokes v. Noonan and Act No. 2004-455, which was clarified in Riley v. Kennedy, should come as no surprise. This is the common law system at work. It is one reason why it can be so very difficult for the State to precisely describe how a changed statute, regulation, or procedure will play out, and, in turn, why the strict requirement that jurisdictions covered by Section 5 do so can be unreasonable. For this reason, to the extent it must be judged, the State should be judged by the pronouncements of its Supreme Court as to what the law of the Alabama is (where they exist), and not by the actions of one or two or three counties. Such a position would be consistent with the Lockhart Court's reluctance to have USDOJ trying to "speculat[e] as to state law." City of Lockhart v. United States, 460 U.S. 125, 133 n.8, 103 S. Ct. 998, 1003 n.8 (1983).

From An Election to an Appointment

Another aspect of the objection letter causes me great concern and warrants further consideration. The objection letter evidences a general disapproval of changes from elections to appointments, seemingly in all situations. Such a position, if held by USDOJ, is a further affront to State sovereignty in that it constitutes a grave interference with the State's ability to manage its affairs and make progress for its citizenry. Such a position, if held by USDOJ, likely violates the Tenth Amendment and the principles set out in such decisions as Coyle v. Smith, 221 U.S. 559, 31 S. Ct. 688 (1911) and Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365 (1997). See Coyle, 221 U.S. at 567, 31 S.Ct. at 690 ("'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."); Printz, 521 U.S. at 918-19 ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' The Federalist No. 39, at 245 (J. Madison).").

An example will serve to illustrate my point. Judges are elected in Alabama. While I have publicly supported the continued election of judges in Alabama, others, including the Alabama Bar Association, would like to see merit selection for appellate judges. The Association's website reports that Alabama is one of only seven States that continue to elect judges. Which system is better is a matter on which reasonable people can, and do, disagree. There are policy arguments to be made on both sides. For present purposes, the important point is that the policy discussion should stay in Alabama.

Should Alabama's voters adopt a constitutional amendment altering how judges are selected in this State, it would be egregious for USDOJ to trump that choice simply because the move is from election to appointment. This is especially true given that many other States do not elect their judges, according to the Alabama Bar Association, and given that the policy choice at the federal level calls for appointment. Interposing an objection in that situation would not be enforcing the constitutional rights of minority groups, it would be invading the constitutional rights of sovereign States.

To the extent that the objection was interposed in part because of an anti-appointment policy, the State believes the objection should be reconsidered. Such reconsideration must extend beyond the purposes of the Voting Rights Act to a recognition of the limits placed on that important legislation by the United States Constitution. Cf. Reno v. Bossier Parish School Board, 528 U.S. 320, 120 S. Ct. 866 (2000) ("Such a reading would also exacerbate the `substantial' federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality.") (internal citation omitted); Presley v. Etowah County Comm'n, 502 U.S. 491, 500-01, 112 S. Ct. 820, 827 (1992) (recognizing that Section 5 is "an extraordinary departure from the traditional course of relations between the States and the Federal Government," though it was constitutionally permissible at the time is was passed as a result of circumstances then prevailing); New York v. United States, 505 U.S. 144, 187-88, 112 S. Ct. 2409, 2434 (1992) ("[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may

resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").

There is a second point to be made on the issue of moving from election to appointment. We deal here with the limited use of appointment. While substantial space has been devoted to the fact that Stokes v. Noonan and Riley v. Kennedy apply beyond the vacancy in District 1 of the Mobile County Commission in the Fall of 2005, it is equally important keep in mind that these decisions operate only in the case of vacancy. In the normal course of business, county commissioners are elected.

For instance, Samuel L. Jones was appointed to his seat after the invalid special election held in Mobile County in 1987. He was re-elected to subsequent terms that kept him in office until 2005, when he resigned to become the elected Mayor of the City of Mobile. Mr. Jones' departure from office during an elected term created the vacancy to which Juan Chastang was appointed. Mr. Chastang will need to run for election in 2008 to continue to serve as the Commissioner for District 1.

Thus, the decisions in Stokes v. Noonan and Riley v. Kennedy are readily distinguishable from an Act that would permanently change the method of selection of a government official from election to appointment. It is not clear that USDOJ gave due consideration to this distinction. See Objection letter, 3 ("Attorneys General have on at least ten occasions previously interposed objections to changes in the method of selection from election to appointment in Alabama and elsewhere.").

The Reasons for the Change

In any event, even were it appropriate for USDOJ to adopt a blanket policy of interposing objections to all changes from elections to appointments, the submission before you would still warrant an exception to that policy. As I have set out above, the reason for the change from special election to appointment in the case of certain vacancies arising on county commissions (*i.e.*, those where there is a local law authorizing the special election that pre-dates Act No. 2004-455), is that decisions of the State's highest court demand it. Stokes v. Noonan; Riley v. Kennedy. And, again, those decisions were based on generally-applicable, race-neutral principles.

The change was not the result of a policy decision to favor appointments or to favor appointments in certain areas of the State. An objection that would command a State to ignore the decisions of its Supreme Court and to act in a manner in violation of its governing charter should only, if ever, be interposed in the most unusual and compelling of circumstances. These are not those circumstances.

The objection letter fails to convey that USDOJ gave any consideration to the fact that Stokes v. Noonan and Riley v. Kennedy are legal decisions of this State's highest court, not policy choices. The statement that "[i]n the meantime, special elections may be held pursuant to Act No. 85-237", Objection letter, 3, and the cold assessment that Act No. 85-237 is binding, irregardless of its unconstitutionality and solely because it was precleared, id. at 2, represent a disregard for the sovereignty of the State and for the Tenth Amendment to the United States Constitution. The State ought not be put in this situation, and USDOJ has an obligation to not lightly cause this situation.

The State's Burden

Alabama understands that it has the burden of demonstrating that any submitted change is not retrogressive, but that burden can only be so heavy and so ill-defined and be constitutional. Here, the objection letter states that the objection is interposed because USDOJ "ha[s] received no indication that the voters of District 1 would have selected the particular individual selected by the Governor." Objection letter, 3. That is, USDOJ is objecting because Alabama has not demonstrated that in the Fall of 2005 the voters of District 1 of Mobile County would have voted for Juan Chastang had a special election been held. It is not clear how the State could prove such a thing, were it even relevant in light of the change actually submitted for preclearance.[20]

The objection letter relies on 28 C.F.R. § 51.54(a), which provides as follows: "A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See Beer v. United States, 425 U.S. 130, 140-42 (1976)." See Objection letter, 1. Beer was reapportionment case, and

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[20] Some of the memoranda summarizing telephone calls between USDOJ and unidentified individuals in Mobile County include speculation about whether those individuals thought Juan Chastang could have been elected to the position he now holds. The identities of the individuals called are unknown to the State; that information has been blacked out of the records we received to protect their privacy. Likewise unknown is the identity, if any, of Mr. Chastang's fictional opponent. In our experience, the results in elections frequently turn on the identity of the candidates.

thus the issue concerned a redrawing of district lines that would impact whether members of a minority group would have an improved, unchanged, or worse chance to elect the candidates of their choice at each and every election that followed until the limes were redrawn.

To conclude from Beer that USDOJ should interpose an objection to the use of an appointment to fill a vacancy, where appointment is the only method authorized by State law, and where appointment is the longstanding general law of the State, because an unauthorized special election was once held, and because the State is unable to affirmatively prove who would win a special election were it to be held, is remarkable indeed. Such an application of Beer does not appear to me to be what the United States Supreme Court had in mind. Nor does it respect the difficult position in which the State is placed.

CONCLUSION

For all of these reasons, I request reconsideration of the decision to interpose an objection to State's enforcement of the Alabama Supreme Court's decisions in Stokes v. Noonan and Riley v. Kennedy. I further request that, as the reconsideration proceeds, if USDOJ needs information, it inform the State of what information it needs to assure itself that the Section 5 does not require an objection to the enforcement of these decisions.

The plaintiffs in the federal litigation are pushing for immediate and invasive relief. Therefore, I also request that the reconsideration proceed as quickly as it responsibly can. Of course, I understand that pursuant to 28 C.F.R. § 51.48 a new 60-day period commences upon

your receipt of this request for reconsideration. I also understand that clock could restart in the event that USDOJ does not now have all of the information that it needs to complete its analysis.

Upon further analysis, I urge USDOJ to withdraw this objection. The decision to interpose an objection to the enforcement of Stokes v. Noonan and Riley v. Kennedy in the first place has put the State in a very difficult position. The issue is important enough that, if the objection is not withdrawn, the State could be forced to pursue judicial preclearance. Such a course of action is time-consuming and generally undesirable. I hope it can be avoided, and I look forward to hearing from you.

Sincerely,

/s/ Troy King

Troy King
Attorney General

Case 2:05-cv-01100-MHT-DRB Document 14 Filed 01/13/2006 Page 1 of 1

Act No.85-237 S. 262-Senator Figures

AN ACT

Relating to Mobile County; prescribing procedure for filling certain vacancies on the county commission.

Be It Enacted by the Legislature of Alabama:

Section 1. Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.

Section 2. The provisions of this act are severable. If any part of the act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this act are hereby repealed.

Section 4. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved April 8, 1985
Time: 4:00 P.M.

ACT No. 2004- 455

RECEIVED
May 5 2004
Governor's Office

SB331

63743-3

By Senator Holley

RFD: Governmental Affairs

First Read: 17-FEB-04

ENROLLED, An Act,

To amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of county commissioner.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 11-3-6 of the Code of Alabama 1975, is amended to read as follows:

"§11-3-6.

"Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Section 2. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

SB331

/s/ Lucy Baxley
President and Presiding Officer of the Senate

/s/ Seth M. Hammett
Speaker of the House of Representatives

SB331

Senate 30-MAR-04
I hereby certify that the within Act originated in and passed the Senate, as amended.

McDowell Lee
Secretary

House of Representatives
Passed: 04-MAY-04

By: Senator Holley

APPROVED 5-14-04

TIME 11:15 a.m.

/s/ Bob Riley
GOVERNOR

Alabama Secretary Of State
Act Num....: 2004-455
Bill Num...: S-331
Recv'd 05/14/04 01:46pm

Ala. Code § 11-3-6, Vacancies

Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the Governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed.

(Code 1852, § 698; Code 1867, § 826; Code 1876, § 740; Code 1886, § 820; Code 1896, § 952; Code 1907, § 3307; Code 1923, § 6749; Code 1940, T. 12, § 6; Act 2004-455, p. 809, § 1.)

Ala. Code Tit. 12 § 6 (1940)

Vacancy; how filled. – In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

Ala. Code §6749 (1923)

Vacancy; how filled. – In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

Ala. Code §3307 (1907)

Vacancy; how filled. – In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he was appointed.

Ala. Code §952 (1896)

Vacancy; how filled. – In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

Ala. Code §820 (1887)

Vacancy; how filled. – In case of a vacancy, it is to be filled by the governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

Ala. Code §740 (1876)

Vacancy; how filled. – In case of a vacancy, it is to be filled by the *a* governor, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

a Nov, 25, 1868, p. 351, sec. 1.

No. 12.]

AN ACT

To authorize the Governor to fill vacancies in certain county offices.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the Governor be, and he is hereby authorized and empowered to fill any and all vacancies now existing or which may hereafter exist in the offices of county commissioners, treasurers, tax collectors and assessors, justices of the peace, constables, sheriffs and all other county officers, except such officers whose appointments are otherwise provided for by law, by the appointment of some person to fill said vacancy.

SEC 2. *Be it further enacted*, That the person so appointed shall be duly commissioned, and shall hold office until the day of the next general election thereafter.

SEC 3. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are hereby repealed.

SEC. 4. *Be it further enacted*, That this act shall take effect from and after its passage.

Approved, November 25, 1868.

Ala. Code §826 (1867)

Vacancy, how filled. – In case of a vacancy, it is to be filled by the court, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

Ala. Code § 698 (1852)

In case of a vacancy, it is to be filled by the court, and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed